

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE EASTERN DISTRICT OF TEXAS  
3                   MARSHALL DIVISION

4                 IP INNOVATION, L.L.C.         )  
5                 and TECHNOLOGY LICENSING     )  
6                 CORP.,                             )  
7                 )                                     )  
8                 Plaintiffs                         )  
9                 )                                     ) Civil Docket No.  
10               VS.                                 ) 2:07-CV-447-RRR  
11               RED HAT, INC. and                 ) April 30, 2010  
12               NOVELL, INC.                         )  
13               )                                     )  
14               Defendants                         ) 8:00 A.M.  
15

16   TRANSCRIPT OF JURY TRIAL  
17   BEFORE THE HONORABLE RANDALL R. RADER  
18   UNITED STATES CIRCUIT JUDGE

19   APPEARANCES:

20                 FOR THE PLAINTIFF:                 MR. JOSEPH A. CULIG  
21   MR. ARTHUR A. GASEY  
22   MR. PAUL C. GIBBONS  
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37   (Proceedings recorded by mechanical stenography,  
38   transcript produced on CAT system.)

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10 \* \* \* \* \*

11 P R O C E E D I N G S

12 (Jury out.)

13 THE COURT: Good morning.

14 Are you holding down the fort,

15 Mr. Gibbons?

16 MR. GIBBONS: They sent me as the advance  
17 scout, I think, because I had a suit coat on. They said  
18 head on over.

19 THE COURT: Okay. Do we have any issues  
20 or needs this morning?

21 MR. REITER: I think we need to do the  
22 formal charge conference and lodge our objections to the  
23 jury instructions.

24 THE COURT: That would be very appropriate  
25 at this time. So we met last night. I have given you

08:10 1 my final versions of the instructions.

08:10 2 Mr. Gibbons?

08:10 3 MR. GIBBONS: The Plaintiffs have a few  
08:10 4 objections, Your Honor, to the final set of jury  
08:10 5 instructions.

08:10 6 We have an objection to the final  
08:10 7 instruction with respect to the Inventorship  
08:10 8 instruction, Your Honor --

08:10 9 THE COURT: All right.

08:10 10 MR. GIBBONS: -- specifically Part B. And  
08:10 11 it's the requirement that each of the inventors work on  
08:11 12 the same subject matter.

08:11 13 Further down in that section, it's the  
08:11 14 requirement that they must have directly collaborated.

08:11 15 Is it alright if I read it in the record?

08:11 16 THE COURT: This is fine. I think you  
08:11 17 need to make at least some kind of record of what your  
08:11 18 objections are so that you're protected.

08:11 19 MR. GIBBONS: In the final sentence, the  
08:11 20 term regarding each co-inventor engaged with the other  
08:11 21 co-inventors.

08:11 22 And then we have objections with respect  
08:11 23 to damage instructions, specifically, Part A at the  
08:11 24 bottom with respect to burden. Some of the language  
08:11 25 that we had wanted inserted had been struck by the

08:12 1 Court, and that deals with the accuracy of the records  
08:12 2 and the --

08:12 3 THE COURT: Why don't you read me just a  
08:12 4 sentence or two of what you wanted so that it's clear.

08:12 5 MR. GIBBONS: Sure. What was taken out  
08:12 6 was where the amount of damages cannot be determined  
08:12 7 with precision. Any doubts regarding the amount of  
08:12 8 damages must be resolved against Defendants.  
08:12 9 Specifically, if absolute damages cannot be determined  
08:12 10 with precision from the evidence available from  
08:12 11 Defendants is inadequate, such as where a calculation of  
08:12 12 damages is impeded by Defendants' incomplete or  
08:12 13 inaccurate records, damages may be estimated on the best  
08:12 14 available evidence, resulting in uncertainties and  
08:12 15 doubts against the Defendants.

08:12 16 And we also have an objection in Section C  
08:12 17 with regard to reasonable royalty, specifically the  
08:12 18 paragraph regarding Apple, Apple Computer, and the --  
08:13 19 specifically the language that -- regarding at least  
08:13 20 Apple's internal use.

08:13 21 Is that clear enough, sir?

08:13 22 THE COURT: If I recall right, you wanted  
08:13 23 that to say and not sales, or something like that?

08:13 24 MR. GIBBONS: I believe so, Your Honor.  
08:13 25 Let me check that.

08:13 1 THE COURT: I think I recall that.

08:13 2 MR. GIBBONS: I'm not sure if we had it in  
08:13 3 our version. I think that was proposed by the  
08:13 4 Defendants and was part of the discussions, Your Honor.  
08:13 5 I had left to go prepare the closing.

08:13 6 THE COURT: I think you've covered pretty  
08:13 7 well what I recall as your concerns.

08:13 8 MR. GIBBONS: Fair enough. Thank you,  
08:13 9 Your Honor.

08:13 10 THE COURT: Just a comment: I think on  
08:13 11 the Inventorship, the Court took most of this language  
08:13 12 right from federal circuit opinions. On the damages  
08:14 13 portion, the language you refer to came from cases where  
08:14 14 there were errors in the records of the Defendants, and  
08:14 15 the Defendants were responsible for some inadequacy of  
08:14 16 records, which this record doesn't support that, in the  
08:14 17 Court's view. It just doesn't seem to be available  
08:14 18 records of any kind.

08:14 19 And the final point on the Apple, I think  
08:14 20 is dealt with pretty well by the language the Court did  
08:14 21 select. But your objections are noted, and I think  
08:14 22 preserved.

08:14 23 MR. GIBBONS: Thank you, Your Honor.

08:14 24 THE COURT: Now, Ms. LaValle.

08:14 25 MS. LAVALLE: Good morning, Your Honor.

08:14 1                   We have just a few objections to the final  
08:14 2 jury charge and the verdict form.

08:14 3                   THE COURT: Okay.

08:14 4                   MS. LAVALLE: First, we have some  
08:14 5 objections to the Court's claim construction. We object  
08:14 6 to several of the terms.

08:14 7                   THE COURT: Could I for just one  
08:15 8 second interrupt you. Did you have claim construction  
08:15 9 concerns, Mr. Gibbons?

08:15 10                  MR. GIBBONS: I don't believe so. I can  
08:15 11 check on that.

08:15 12                  THE COURT: Check on that in the interim,  
08:15 13 so that we make sure that we have you on record on that,  
08:15 14 too.

08:15 15                  Please, Ms. LaValle, continue.

08:15 16                  MS. LAVALLE: The first term that  
08:15 17 Defendants object to the Court's claim construction on  
08:15 18 is perceptible as the same tool. The Court's  
08:15 19 construction is recognized as the same tool, even if the  
08:15 20 objects have some different display characteristics,  
08:15 21 including different positions, sizes, and contexts.

08:15 22                  Defendants proposed a construction that  
08:15 23 reads: Generated to achieve object constancy such that  
08:15 24 changes made to shared features of a tool appearing in  
08:15 25 one workspace, for example, content, data, et cetera,

08:15 1 are reflected in features of tools in other workspaces.

08:15 2 Defendants believe that the Court's  
08:15 3 construction is inconsistent with the intrinsic record  
08:15 4 of the patents. And that was perceptible as the same  
08:16 5 tool.

08:16 6 The second term that we have objection to  
08:16 7 the Court's construction of is workspace data structure.  
08:16 8 The Court actually did not construe that term. The  
08:16 9 Court said that no construction is necessary.

08:16 10 The Defendants proposed a construction of  
08:16 11 body -- the Defendants' construction was stated as body  
08:16 12 of interrelated items of data corresponding to a  
08:16 13 particular workspace. The Defendants believe that the  
08:16 14 Court's failure to construe this term is incorrect as a  
08:16 15 matter of law, as it is necessary to construe this term  
08:16 16 in order to assist the jury and resolve the parties'  
08:16 17 dispute regarding the meaning of this claim term.

08:16 18 The next term that Defendants have an  
08:16 19 objection to the construction of is workspace data  
08:16 20 similar to the term workspace data structure. Again,  
08:16 21 the Court ruled that no construction was necessary, and  
08:17 22 Defendants proposed a definition of interrelated items  
08:17 23 of data corresponding to a particular workspace.

08:17 24 Again, the Defendants believe that a  
08:17 25 construction was necessary to assist the jury and to

08:17 1 resolve the parties' dispute regarding the meaning of  
08:17 2 this term.

08:17 3                   The Defendants also object to the Court's  
08:17 4 construction of two means plus function terms; that is,  
08:17 5 control means and display object means. The Court  
08:17 6 construed the corresponding structure of control means  
08:17 7 to be executable computer code implementing selectable  
08:17 8 graphical user interface pop-up menus and icons and  
08:17 9 their equivalents.

08:17 10                  Defendants believe that under federal  
08:17 11 circuit law, it's clear that if you have a computer  
08:17 12 implemented means plus function claim, the corresponding  
08:18 13 structure should be an algorithm. And in this case,  
08:18 14 there was an algorithm disclosed in the specification.  
08:18 15 So Defendants proposed corresponding structure to this  
08:18 16 means plus function term control means that we presented  
08:18 17 was: Procedures and algorithm specified in flowcharts  
08:18 18 of exit and enter workspace procedures disclosed in  
08:18 19 Figures 13, 18A, and 18B as well as Figure 10 and the  
08:18 20 accompanying pseudocode disclosed in Table 1 that was in  
08:18 21 Column 21 of the specification representing workspace  
08:18 22 data structures and their equivalents.

08:18 23                  Defendants' objection to the means plus  
08:18 24 function term display object means a similar --  
08:18 25 Defendants believe that under federal circuit law, the

08:19 1 corresponding structure of a computer implemented means  
08:19 2 plus function claim would be the disclosed algorithm.

08:19 3                   But in this case, there was no disclosed  
08:19 4 algorithm in the specification, so in this case,  
08:19 5 Defendants argue that this claim term was indefinite as  
08:19 6 a matter of law. There was no algorithm disclosed as  
08:19 7 the corresponding structure for display object means.

08:19 8                   The Court construed the structure to be  
08:19 9 display system object and its equivalents, and  
08:19 10 Defendants believe that that definition is indefinite.

08:19 11                   That's all of our objections to the  
08:19 12 Court's claim construction.

08:19 13                   THE COURT: As you understand, we've  
08:19 14 played the game under those rules, so it's little hard  
08:19 15 for the Court to reconsider them at this point, but your  
08:19 16 objections are noted.

08:19 17                   MS. LAVALLE: Thank you, Your Honor.

08:19 18                   MR. GIBBONS: Your Honor --

08:19 19                   THE COURT: Excuse me. Mr. Gibbons?

08:20 20                   MR. GIBBONS: I was going to say that  
08:20 21 Plaintiffs' have no objection to the Court's claim  
08:20 22 construction.

08:20 23                   THE COURT: Okay. Fine.

08:20 24                   MS. LAVALLE: We have a few other  
08:20 25 objections to --

08:20 1                   THE COURT: On the instructions, please  
08:20 2 proceed.

08:20 3                   MS. LAVALLE: With respect to the  
08:20 4 Inventorship instruction, Defendants object to the last  
08:20 5 sentence of that instruction. Specifically, Defendants  
08:20 6 object to the inclusion of the phrase, in some cases,  
08:20 7 before the last sentence that states: In some cases,  
08:20 8 the interplay between conception and collaboration  
08:20 9 requires that each co-inventor engage with the other  
08:20 10 co-inventors to contribute to a joint conception.

08:20 11                  Defendants believe that this instruction  
08:20 12 is contrary to the federal circuit's recent opinion in  
08:20 13 Vanderbilt versus ICOS Corporation, which indicates that  
08:20 14 in all cases, the interplay between conception and  
08:20 15 collaboration requires that each co-inventor engage with  
08:20 16 the other co-inventors to contribute to a joint  
08:20 17 conception.

08:20 18                  THE COURT: Ouch. You're going to fault  
08:21 19 me for not following the federal circuit?

08:21 20                  MS. LAVALLE: We think you got it close,  
08:21 21 Your Honor.

08:21 22                  THE COURT: You're very delicate, but you  
08:21 23 continue with the objection you need to make.

08:21 24                  MS. LAVALLE: Thank you, Your Honor.

08:21 25                  We have several objections to the damages

08:21 1 instruction, and that will be our last objection.

08:21 2 THE COURT: Okay.

08:21 3 MS. LAVALLE: First, we have an objection  
08:21 4 to the damages instruction regarding a reasonable  
08:21 5 royalty. Specifically, the parties and the Court met  
08:21 6 last night and agreed to include a -- or the Court, at  
08:21 7 least, allowed us to include a sentence that had to do  
08:21 8 with the Apple license and Plaintiffs.

08:21 9 THE COURT: Yes.

08:21 10 MS. LAVALLE: And Defendants agree with  
08:21 11 this instruction, except that we disagree with the  
08:21 12 inclusion of the phrase, at least. And I'll read the  
08:22 13 sentence. It says: With respect to the license  
08:22 14 agreement entered into between Apple and Plaintiffs, you  
08:22 15 should keep in mind that when Plaintiffs sued Apple, the  
08:22 16 law allowed Plaintiffs to receive damages for at least  
08:22 17 Apple's internal use.

08:22 18 (Discussion off the record.)

08:22 19 MS. LAVALLE: If Your Honor will --

08:22 20 MR. REITER: I'm sorry, Your Honor. I  
08:22 21 didn't mean to interrupt.

08:22 22 The objection is the inclusion of the  
08:22 23 phrase, at least Apple's use. So it should be: To  
08:22 24 receive damages that predated the filing. So the  
08:22 25 reference to Apple's use exclusively, we object to that.

08:22 1 I just wanted that to be clear.

08:22 2 THE COURT: Thank you. I think that the  
08:22 3 jury is going to understand that we're talking about the  
08:22 4 use that predicated. But please continue.

08:22 5 MS. LAVALLE: I'll move on to the next  
08:23 6 objection that we have to the damages instruction.

08:23 7 We object to the omission of an  
08:23 8 instruction regarding the entire market value rule in  
08:23 9 this case. It's our belief that the jury should  
08:23 10 consider the questions relating to the entire market  
08:23 11 value rule in this case, because Plaintiffs' expert is  
08:23 12 presenting an opinion on damages, which applies a  
08:23 13 royalty rate to a royalty base.

08:23 14 And Plaintiffs' expert included 100  
08:23 15 percent of units that were distributed during the  
08:23 16 applicable damages period and did not offer an opinion  
08:23 17 that would discount either the royalty base or the  
08:23 18 royalty rate for the fact that the majority of  
08:23 19 Defendants' products are not used in an infringing  
08:23 20 manner.

08:23 21 Finally, we have an objection to -- I'm  
08:24 22 sorry -- we have a couple more objections to the damages  
08:24 23 instructions. One is, we have an objection to having an  
08:24 24 inclusion of a running royalty instruction at all in the  
08:24 25 instructions and in the verdict form, because there's no

08:24 1 reliable evidence of royalty base based on a number of  
08:24 2 units in this case.

08:24 3 Defendants believe that a reasonable jury  
08:24 4 would not be able to apply a royalty rate to a royalty  
08:24 5 base in this case and come to a reasonable decision.

08:24 6 The evidence is just too unreliable in this case.

08:24 7 Our last objection to the damages  
08:24 8 instruction is that we have an objection to the sentence  
08:24 9 in the instruction that states: While Plaintiffs may  
08:24 10 not establish the amount of damages by mere speculation  
08:24 11 or guess, Plaintiffs satisfy their burden by showing the  
08:24 12 extent of damages as a matter of just and reasonable  
08:24 13 inference, even if the damages established are an  
08:25 14 approximation.

08:25 15 I'm sorry. I think I stated incorrectly  
08:25 16 that this was Defendants' proposed instruction, but I  
08:25 17 meant that this was Plaintiffs' proposed sentence in the  
08:25 18 damages.

08:25 19 THE COURT: Thank you. I understood it  
08:25 20 that way.

08:25 21 MS. LAVALLE: Right. We object to this  
08:25 22 sentence, because we believe it's contrary to the law,  
08:25 23 it's vague, and it may cause confusion for the jury.  
08:25 24 And as a consequence, it would be prejudicial to the  
08:25 25 Defendants.

08:25 1 Thank you, Your Honor.

08:25 2 THE COURT: Thank you, Ms. LaValle.

08:25 3 Mr. Gibbons, anything else?

08:25 4 MR. GIBBONS: I don't believe we have  
08:25 5 anything further.

08:25 6 THE COURT: Okay. We've preserved our  
08:25 7 objections.

08:25 8 Mr. Gibbons.

08:25 9 MR. GIBBONS: Other than objections, we do  
08:25 10 have a small housekeeping matter.

08:25 11 THE COURT: Sure.

08:25 12 MR. GIBBONS: We're going to buy the jury  
08:25 13 lunch. I brought a menu, and we didn't know if they  
08:25 14 would like to select items or just order sandwiches.

08:26 15 THE COURT: Can you handle that with  
08:26 16 Peggy? Peggy can coordinate that. She works right with  
08:26 17 the jury.

08:26 18 MR. GIBBONS: Fair enough. Thank you,  
08:26 19 Your Honor.

08:26 20 MR. REITER: I just want to make sure  
08:26 21 that's not a PX exhibit, Your Honor.

08:26 22 THE COURT: I think I understood both  
08:26 23 parties were -- Mr. Gibbons said that. Mr. Gibbons, I  
08:26 24 think, was clear that he had worked with Mr. Lyon on  
08:26 25 that.

08:26 1 MR. GIBBONS: We're going to send him the  
08:26 2 bill and go from there.

08:26 3 [Laughter.]

08:26 4 THE COURT: Good attorney. You get the  
08:26 5 credit; he gets the bill.

08:26 6 MR. HILL: Your Honor, will the Court make  
08:26 7 available to us a final written version of the Charge  
08:26 8 that you're actually going to read?

08:26 9 THE COURT: Yes. I thought you had that.  
08:26 10 Did you have it --

08:26 11 MR. REITER: It was e-mailed out last  
08:26 12 night.

08:26 13 THE COURT: It was e-mailed, but we can  
08:26 14 get you written copies as well.

08:26 15 MR. HILL: I just wasn't sure if the Court  
08:26 16 was making any last-minute changes. So the extent  
08:26 17 that --

08:26 18 THE COURT: The Court does not have any  
08:26 19 changes.

08:26 20 MR. HILL: Okay. I just wanted to make  
08:27 21 sure what I put in front of the jury in terms of either  
08:27 22 on a document camera or otherwise to emphasize an  
08:27 23 instruction would be the final version so that I didn't  
08:27 24 have a boo-boo in that regard.

08:27 25 THE COURT: You should follow along,

08:27 1 because I'm a little notorious for ad libbing here and  
08:27 2 there. But I will not depart from the substance as much  
08:27 3 as I can. But you should follow along carefully.

08:27 4                   If you have any question, what I would  
08:27 5 request you to do is request a sidebar right after I --  
08:27 6 let me finish -- out of respect, you let me finish, but  
08:27 7 then request a sidebar and we'll talk about it. If I  
08:27 8 think I misspoke in some way, I will correct it on the  
08:27 9 spot.

08:27 10                MR. REITER: You mean finish the whole  
08:28 11 thing?

08:28 12               THE COURT: Yes. I'll finish the whole  
08:28 13 thing, but -- I will go through the whole thing, and  
08:28 14 then if you have a place where you think I slipped or  
08:28 15 did something you didn't expect, request a sidebar and  
08:28 16 I'll go back and correct that point right before you  
08:28 17 give your closing arguments.

08:28 18               MR. HILL: Thank you, Your Honor.

08:28 19               THE COURT: Are we just about ready?

08:28 20               MR. GASEY: Yes, Your Honor.

08:28 21               THE COURT: Give me just one second, and I  
08:28 22 actually need to check and see -- we had one juror who  
08:28 23 was calling in a little late, and I need to go and check  
08:28 24 and see if that juror arrived.

08:28 25               So I'll be right back.

08:28 1 (Recess.)

08:28 2 (Jury in.)

3 THE COURT: Good morning. Please be  
4 seated.

5 Mr. Reiter.

6 MR. REITER: With the Court's permission,  
7 I'd like to have Dr. Putnam, Defendants' damages expert,  
8 resume his testimony.

9 THE COURT: Please.

10 JONATHAN D. PUTNAM, Ph.D., DEFENDANTS' WITNESS,

11 PREVIOUSLY SWORN

12 DIRECT EXAMINATION (CONTINUED)

13 BY MR. REITER:

14 Q. Good morning, Dr. Putnam.

15 A. Good morning.

16 Q. How are you?

17 A. Fine. Thanks.

18 Q. So I'd like to kind of give everybody a chance  
19 to remember where we were before we broke for the  
20 evening yesterday. I believe we were talking about the  
21 structure of the license that might be executed in the  
22 hypothetical negotiation.

23 Do you recall that?

24 A. Yes.

25 Q. Okay. And I think you said that the license

08:33 1 would be a lump-sum license; is that right?

08:33 2 A. That's right.

08:33 3 Q. Okay. And we were reviewing licenses that had  
08:34 4 been executed in the past to look and see what kind of  
08:34 5 structure those licenses had; is that right?

08:34 6 A. Yes; that's right.

08:34 7 Q. Okay. And so there were four licenses that had  
08:34 8 been executed to these patents.

08:34 9 Did I get that right?

08:34 10 A. Yes.

08:34 11 Q. Hewlett-Packard, Central Point, SGI, and Apple?

08:34 12 A. That's right.

08:34 13 Q. And I think we were in the middle of our  
08:34 14 discussion about the HP license.

08:34 15 Does that sound right to you?

08:34 16 A. Sure.

08:34 17 Q. Okay. Now, just to refresh everybody's memory  
08:34 18 after the evening, could you tell us what the terms of  
08:34 19 the HP license were, generally?

08:34 20 A. Sure. Remember, in the HP case, this is for an  
08:34 21 add-on product, and HP was selling this product to  
08:34 22 another company called Borland. As part of the sale,  
08:34 23 they entered into this license with Xerox. The Xerox  
08:34 24 license with HP said that HP was licensed for all the  
08:34 25 sales that it made in the past, and we calculated that

08:35 1 to be about \$12 million.

08:35 2 And then going forward, Borland would be  
08:35 3 licensed for another \$10 million of sales. So there was  
08:35 4 a total of about \$22 million worth of sales that were  
08:35 5 licensed.

08:35 6 For that license, HP paid \$110,000. There  
08:35 7 was one additional provision that Mr. Gemini used that  
08:35 8 if they got past 10 million, there would be a 1-percent  
08:35 9 royalty, but as far as we know, that never happened. So  
08:35 10 the basic terms were a 110,000-dollar payment, \$22  
08:35 11 million in sales.

08:35 12 Q. Now, was there anything in the license --

08:35 13 MR. REITER: Maybe we could put up DX770  
08:35 14 and go to Exhibit B.

08:35 15 Q. (By Mr. Reiter) Was there anything in the  
08:35 16 license that indicated that the license was being  
08:35 17 transferred to Borland?

08:35 18 A. Yes. There's an amendment at the end or an  
08:35 19 exhibit, I guess it's called, that describes this  
08:35 20 license as being negotiated as part of a transfer of the  
08:35 21 Dashboard business from HP to Borland on the same date.

08:36 22 Q. Does that tell you anything about what Xerox  
08:36 23 knew about the relationship between HP and Borland?

08:36 24 A. Yes. Well, Xerox was, obviously. Because they  
08:36 25 were a party to the license, they knew that

08:36 1 Hewlett-Packard was selling off its business on that  
08:36 2 day, and Hewlett-Packard wasn't going to be the party  
08:36 3 that was licensed. It was going to Borland, and Xerox  
08:36 4 knew that, because they signed an agreement in which  
08:36 5 Hewlett-Packard said we're selling this business to  
08:36 6 Borland.

08:36 7 Q. Now, you know what Borland did with the product  
08:36 8 as far as the price goes after it acquired the  
08:36 9 company -- or the business?

08:36 10 A. Yes. Like any company, they were excited about  
08:36 11 the chance to sell this new product, but they had a new  
08:36 12 strategy for it. And their new strategy for it was to  
08:36 13 drop the price.

08:36 14 So the first thing they were going to do  
08:36 15 was take the price down from \$99 to \$49. They thought  
08:36 16 they could make more money doing that, I guess.

08:36 17 Q. I think in your first report, you indicated a  
08:37 18 price of \$99 attributable to HP but nothing about  
08:37 19 Borland.

08:37 20 Why nothing about Borland?

08:37 21 A. Well, at the time, the transfer to Borland  
08:37 22 wasn't relevant when Mr. Gemini was developing his first  
08:37 23 set of theories, the ones he subsequently discarded, and  
08:37 24 we were talking about the price of an entire system and  
08:37 25 the revenue from a system, that was his method of

08:37 1 calculating this.

08:37 2 As part of calculating the revenue for the  
08:37 3 system, we used the 99-dollar figure, because that's  
08:37 4 what we had for HP. When Mr. Gemini changed his mind  
08:37 5 and said let's move to a per-unit royalty and let's take  
08:37 6 it at 1 percent, it became important to actually find  
08:37 7 out how much this product was sold for in the real world  
08:37 8 under the license. And so we did further research and  
08:37 9 looked that up.

08:37 10 Q. Now, we had talked about the SGI license, which  
08:37 11 was -- which kind, a lump sum or a running royalty?

08:37 12 A. The SGI license was an operating system  
08:37 13 license, and it was a lump sum, one 95,000-dollar  
08:37 14 payment.

08:37 15 Q. Okay. Apple, lump sum or running royalty?

08:37 16 A. Also lump sum.

08:38 17 Q. Okay. Now, how would you qualify -- given all  
08:38 18 the information we just discussed, how would you qualify  
08:38 19 the HP license, lump sum or running royalty?

08:38 20 A. It's a lump-sum license. There's no evidence  
08:38 21 that the running portion of the license was ever  
08:38 22 operable.

08:38 23 Q. Okay. And the Central Point, lump sum or  
08:38 24 running royalty?

08:38 25 A. That's a running royalty.

08:38 1 Q. Okay. Now, having gone through the licenses  
08:38 2 that Xerox or the Plaintiffs executed with respect to  
08:38 3 these patents, did you look at any other licenses that  
08:38 4 maybe applicable in doing your analysis?

08:38 5 A. Yes. Remember, what you're trying to do -- the  
08:38 6 whole context of this is just how would these parties on  
08:38 7 both sides of the courtroom behave, if they were sitting  
08:38 8 down at a bargaining table.

08:38 9 And so we know that the Plaintiffs, or the  
08:38 10 people before them -- Xerox before them, we know that  
08:38 11 they negotiated primarily lump-sum licenses. And so now  
08:38 12 the question is, what will the Defendants do, if they  
08:38 13 were negotiating a license. And the answer is, there's  
08:38 14 one license that Red Hat entered into that covers the  
08:38 15 accused products, and that's also a lump-sum license.

08:39 16 So both parties, either exclusively or  
08:39 17 primarily, negotiate lump-sum licenses.

08:39 18 Q. There was some testimony about a license that  
08:39 19 Novell executed. Do you recall that?

08:39 20 A. Yes.

08:39 21 Q. Was that a lump sum or a running royalty based  
08:39 22 on the deposition testimony that you heard?

08:39 23 A. Based on the deposition testimony -- so, first  
08:39 24 of all, my understanding is it's not for the accused  
08:39 25 products, but the structure of that license was the

08:39 1 following: Novell paid on a running basis -- in other  
08:39 2 words, pay as you go -- up to a certain amount per year,  
08:39 3 okay? And that amount was in the 200,000s, something  
08:39 4 like that.

08:39 5 So once you sold enough units to the point  
08:39 6 where you were going to pay \$200,000 in that year, but  
08:39 7 you stopped keeping track. And since they sold many  
08:39 8 more units than that, then every year they just wrote a  
08:39 9 check for \$200,000, or whatever it was. So, in effect,  
08:39 10 it was a lump-sum payment that you paid every year and  
08:40 11 not a pay-as-you-go license. You just pay your check on  
08:40 12 January 1st, or whatever, and you're done for the year.  
08:40 13 You don't have to keep track of the number of units.

08:40 14 Q. Are you saying Novell keeps track of their  
08:40 15 units?

08:40 16 A. No, they don't. The point is, you just write  
08:40 17 the check once, and you don't have to worry about  
08:40 18 keeping track of anything.

08:40 19 Q. Okay. There was also some correspondence  
08:40 20 between the Plaintiffs and the Defendants at the  
08:40 21 beginning of the lawsuit.

08:40 22 Do you recall that?

08:40 23 A. Yes.

08:40 24 MR. REITER: Maybe if we could put up  
08:40 25 DX739, please.

08:40 1 Q. (By Mr. Reiter) Do you know what this is,  
08:40 2 Dr. Putnam?

08:40 3 A. Yes. This is a letter from -- it's on the  
08:40 4 stationery of the Niro firm, which is the folks who are  
08:40 5 representing the Plaintiffs in this case, and this is a  
08:40 6 letter addressed to Mr. Cunningham, who is actually here  
08:40 7 in the courtroom. And it's a description of the patents  
08:40 8 and basically an offer to settle the litigation if -- on  
08:41 9 certain terms.

08:41 10 Q. And what kind of terms did Plaintiffs offer?

08:41 11 A. I think you see at the top -- the jury has  
08:41 12 probably seen this, but worth highlighting again. It  
08:41 13 says: Settlement proposal -- and I'll just read that --  
08:41 14 IPI and TLC, who are the Plaintiffs in this case,  
08:41 15 propose a settlement that will fully release Red Hat  
08:41 16 from liability under the PARC patents -- that's the  
08:41 17 Xerox patents -- through the expiration -- which occurs  
08:41 18 later in 2008 -- and also will grant a covenant not to  
08:41 19 sue and a paid-up license.

08:41 20 And the important part for our purposes is  
08:41 21 for a single lump-sum payment.

08:41 22 Q. Now, I think you prepared a lump-sum summary to  
08:41 23 kind of take us through what your conclusion was or why  
08:41 24 there should be a lump-sum license?

08:41 25 A. Yes. Yes. This is actually one of the

08:41 1 important things. So remember, there was a prior chart  
08:41 2 that I did with a nine-part test, and it was all the  
08:41 3 tests that you would apply to the facts to see if you  
08:42 4 would -- the parties would negotiate a running royalty.

08:42 5 Each one of those tests indicated that you  
08:42 6 wouldn't negotiate a running royalty. And so then the  
08:42 7 question becomes, well, is there evidence in favor of  
08:42 8 negotiating a lump-sum royalty?

08:42 9 The answer is yes. As we see on this  
08:42 10 chart, these are licenses to operating system vendors  
08:42 11 and also offers to license. And so in every case, the  
08:42 12 person either is the Defendants or is someone like the  
08:42 13 Defendants, because they sell operating systems.

08:42 14 So we have the SGI license from Xerox.  
08:42 15 That's a lump-sum payment. The cross-license with  
08:42 16 Microsoft is a lump-sum payment. The IPI license with  
08:42 17 Apple is a lump-sum payment. IPI's licenses to -- or  
08:42 18 IPI's -- the Plaintiffs' offer to license to Plaintiffs  
08:42 19 (sic), both Red Hat and Novell, were for lump-sum  
08:42 20 payments.

08:42 21 And finally, when Red Hat negotiated a  
08:42 22 license with DataTern, that was not for these patents,  
08:42 23 but it was a lump-sum payment. And so all of the  
08:42 24 operating system licenses that we are able to examine  
08:43 25 are structured as a lump sum.

08:43 1 Q. That DataTern license that you just mentioned,  
08:43 2 is that the license you were talking about a moment ago  
08:43 3 when you said one of the Defendants had a-lump sum  
08:43 4 license?

08:43 5 A. Yes; that's right.

08:43 6 Q. Okay. Now, let's turn to valuation or I think  
08:43 7 how much the parties would have paid in the hypothetical  
08:43 8 negotiation.

08:43 9 How do you do that? What do you look at  
08:43 10 to determine what the value of the patent is?

08:43 11 A. Well, this is -- you know, mostly common sense,  
08:43 12 and we've actually gone through most of it. The  
08:43 13 question is, what do other people pay for these patents  
08:43 14 when they're being traded in the marketplace.

08:43 15 What you want to get is, what's their fair  
08:43 16 market value. And like with patents or cars or houses,  
08:43 17 the way you determine the fair market value is what do  
08:43 18 people pay for either the same thing or for things that  
08:43 19 are similar.

08:43 20 So we go back to the licenses and look at  
08:43 21 the actual -- instead of just focusing on the structure,  
08:43 22 it's the payment terms. So remember, I told you at the  
08:43 23 beginning it's not just what you pay but how you pay it.  
08:43 24 We've talked about how you pay it; you pay it as a lump  
08:43 25 sum. Now we're going to talk about what you pay.

08:44 1 Q. So did you break up your analysis between  
08:44 2 operating systems and add-on licenses in determining  
08:44 3 valuation?

08:44 4 A. Yes.

08:44 5 Q. Okay. So the two operating system licenses, I  
08:44 6 think, are Apple and SGI?

08:44 7 A. That's right.

08:44 8 Q. So let's talk about the SGI license first. How  
08:44 9 much did they pay again?

08:44 10 A. \$95,000, lump sum.

08:44 11 Q. Okay. And how long did that license last?

08:44 12 A. That was for 13 years, from 1995 through 2008,  
08:44 13 when the patents ended.

08:44 14 Q. Okay. So from when they started a license  
08:44 15 until the patents died?

08:44 16 A. That's right.

08:44 17 Q. Okay. And how about Apple, how much did they  
08:44 18 pay?

08:44 19 A. \$1.25 million.

08:44 20 Q. Okay. And what did that cover?

08:44 21 A. Time period you mean?

08:44 22 Q. No. Actually, I was thinking product-wise.

08:44 23 A. Oh, product-wise, it covered all of Apple's  
08:44 24 products that they might sell anywhere.

08:44 25 Q. Everything?

08:44 1 A. Everything.

08:44 2 Q. Okay. And now how long did that last?

08:44 3 A. And that was for -- it was in 2007. You could  
08:44 4 go back as much as six years.

08:44 5 MR. VICKREY: Your Honor, we object to  
08:45 6 this for the same reasons we discussed last night,  
08:45 7 trying to suggest that it goes back for sales six years  
08:45 8 prior.

08:45 9 THE COURT: I think you can clarify this  
08:45 10 when you get a chance to inquire, Mr. Vickrey.

08:45 11 MR. VICKREY: Thank you, Your Honor.

08:45 12 THE COURT: Please proceed.

08:45 13 Q. (By Mr. Reiter) How long was the Apple license?

08:45 14 A. Well, certainly, this is -- this is a legal  
08:45 15 question. My understanding of the law is that you could  
08:45 16 go back six years from the time of filing of a lawsuit  
08:45 17 and then forward another year and a half until the  
08:45 18 patents ended. So in total, about seven and a half  
08:45 19 years it covered.

08:45 20 Q. How does Apple sales or revenue compare to the  
08:45 21 revenue of the Defendants?

08:45 22 A. Oh, it's much, much larger. Apple sells in the  
08:45 23 tens of billions.

08:45 24 MR. VICKREY: Objection, Your Honor, 403.  
08:45 25 We're getting into sales that have nothing --

08:45 1                   THE COURT: Mr. Vickrey, this is something  
08:45 2 you can deal with on cross.

08:45 3                   MR. VICKREY: All right.

08:45 4                   THE COURT: Thank you. Please proceed.

08:45 5                   Q. (By Mr. Reiter) Okay. So that was the  
08:46 6 two-operating system licenses, the two add-on licenses,  
08:46 7 Central Point, HP, how much did they pay.

08:46 8                   A. Yes, so now we've been through this. For the  
08:46 9 operating system add-ons, the HP license was \$110,000  
08:46 10 lump sum, and the Central Point license was 25 cents per  
08:46 11 copy.

08:46 12                  Q. Is there any evidence that Central Point paid  
08:46 13 anything to Xerox?

08:46 14                  A. No.

08:46 15                  Q. How long did the HP license last?

08:46 16                  A. That license was negotiated in 1994 and, again,  
08:46 17 through the end of the patent's life, so about 14 years.

08:46 18                  Q. What about Central Point?

08:46 19                  A. Also negotiated in 1994, so also 14 years.

08:46 20                  Q. So can you summarize your conclusions about  
08:46 21 what the value one might appraise these patents at based  
08:46 22 on these prior patents?

08:46 23                  A. Sure.

08:46 24                  Q. Or prior licenses? Excuse me.

08:46 25                  A. Yeah, the best evidence is from the operating

08:47 1 system licenses and because the Defendants sell  
08:47 2 operating systems.

08:47 3 And so my conclusion, based on all of the  
08:47 4 evidence, is that the parties would have agreed to a  
08:47 5 payment of about -- or the value of the license --  
08:47 6 comparable value for the parties is about \$100,000.

08:47 7 Q. So is that it, we're done? Is it \$100,000?

08:47 8 A. Well, no. You've got to adjust for the -- for  
08:47 9 various factors in order to make the license that the  
08:47 10 Defendants would have negotiated comparable to the  
08:47 11 licenses that we actually observe in the marketplace.

08:47 12 So, for example, if I'm trading in my  
08:47 13 Jeep, there's a certain value for Jeeps, but you would  
08:47 14 adjust for various factors. For example, I don't drive  
08:47 15 my Jeep very much and so it's got low miles. And so  
08:47 16 that means that the price of my particular Jeep would go  
08:47 17 up relative to the average Jeep.

08:47 18 And so we have to look at those things  
08:47 19 that would cause you to adjust the license one way or  
08:47 20 the other.

08:47 21 Q. Is one of those factors usage, like you talked  
08:47 22 about with respect to your Jeep? How much the  
08:48 23 Defendants would use the technology in their products?

08:48 24 A. Exactly. And that's one of the issues -- you  
08:48 25 know, that I know is a bone of contention in this case.

08:48 1                   Remember, not every copy of the software  
08:48 2 is capable of infringing, because not every copy has a  
08:48 3 display associated with it or has a user interface  
08:48 4 installed on it. So you would -- like if -- in my case  
08:48 5 or in the case of my Jeep, you would discount the price  
08:48 6 if something was not used as much -- well, I guess it's  
08:48 7 backwards now.

08:48 8                   The point of it is, you need to adjust for  
08:48 9 the number of units that are actually using the  
08:48 10 invention. In this case, because fewer units use the  
08:48 11 invention, that would mean a lower price.

08:48 12       Q.     What about demand for the product; does that  
08:48 13 come into play?

14       A.     Sure. You want to see whether the invention is  
08:48 15 actually the basis for customer demand, so you want to  
08:48 16 look at things like do customers buy the product, or in  
08:48 17 this case, do they choose to download the Red Hat or  
08:48 18 Novell products because of the enhanced workspace  
08:49 19 switching feature.

08:49 20                   And there's no evidence that I've seen  
08:49 21 that anybody chose the Red Hat products because of this  
08:49 22 feature. Even if they use it, it wasn't the basis of  
08:49 23 their demand. It's just something, you know, that they  
08:49 24 use.

08:49 25       Q.     What about the Novell products, same

08:49 1 conclusion?

08:49 2 A. And the same conclusion, yes, exactly.

08:49 3 Q. Okay. Anything -- does marketing materials  
08:49 4 come into play? Do you look at those?

08:49 5 A. Yes, I looked at all the marketing materials.  
08:49 6 You know, you have sales reps and things like that and  
08:49 7 they say, okay, when you go out in the marketplace, we  
08:49 8 want you to explain why our product is better than  
08:49 9 everybody else's product, and here's the 25 things we  
08:49 10 want you to keep in mind about why our product is the  
08:49 11 best.

08:49 12 And so I went through those datasheets to  
08:49 13 see what they told their sales reps to tell their  
08:49 14 customers. And there's no place in those datasheets  
08:49 15 where it says anything about make sure you mention the  
08:49 16 enhanced workspace feature. So the sales reps aren't  
08:49 17 talking that up, and so it can't be the reason why  
08:49 18 people actually choose to consume a Red Hat or a Novell  
08:49 19 product.

08:49 20 Q. Now, is there any kind of objective evidence or  
08:49 21 information that you looked at about the relative  
08:50 22 importance or quantity of the feature in the product?

08:50 23 A. Sure. One of the things that people sometimes  
08:50 24 do is -- and this is just sort of a back-of-the-envelope  
08:50 25 calculation, but it's worth examining -- is you look at

08:50 1 all the lines of code in the entire system. There's  
08:50 2 millions of lines of code.

08:50 3 As I understand it, Fedora has 204 million  
08:50 4 lines of code. I can't imagine how much writing that  
08:50 5 is, but it's thousands of software engineers working to  
08:50 6 write various parts of the system.

08:50 7 Then you're asked the question, well, the  
08:50 8 enhanced workspace switching feature, how many lines of  
08:50 9 code is that relative to the total? Dr. Zimmerman said  
08:50 10 he identified about 6,300 lines, as I recall, that were  
08:50 11 lines of code that pertained to the enhanced workspace  
08:50 12 switching feature. So you've got 6,300 lines that are  
08:50 13 the feature and 204 million that are the entire package.  
08:51 14 So you might ask the question, well, what share of the  
08:51 15 total is the feature?

08:51 16 Q. Was that Dr. Zimmerman or Mr. Gray, Defendants'  
08:51 17 expert?

08:51 18 A. I'm sorry. It may have been Mr. Gray. I may  
08:51 19 have misspoken.

08:51 20 Q. Okay. Did you prepare a slide to kind of give  
08:51 21 this -- give us all a perspective of the quantity?

08:51 22 A. Sure. Yes, I did actually.

08:51 23 It's hard to understand with computer  
08:51 24 code. It's easier with things you can touch.

08:51 25 MR. REITER: If we could put the car slide

08:51 1 up.

08:51 2 A. So let's do the math with the car. So 6,300  
08:51 3 lines out of 204 million lines is 0.003 percent of the  
08:51 4 total number of lines. And so if you were applying that  
08:51 5 to a car, that's a very tiny number. If you're applying  
08:51 6 that to a car, suppose your car cost \$30,000, what is  
08:51 7 0.003 percent of a 30,000-dollar car?

08:51 8 Well, that's something that's worth about  
08:51 9 90 cents. That's the share of the total that's  
08:52 10 represented by this feature.

08:52 11 THE COURT: Mr. Vickrey?

08:52 12 MR. VICKREY: May we have a sidebar  
08:52 13 conference?

08:52 14 THE COURT: Yes.

08:52 15 (Bench conference.)

08:52 16 MR. VICKREY: This is like a reverse  
08:52 17 entire market value thing. They're trying to jam the  
08:52 18 reverse argument down our throats. That's not the  
08:52 19 theory of the case. It's prejudicial. You saw a piece  
08:52 20 of the car. We're not asking for a piece of the car.

08:52 21 MR. REITER: This is a very small part of  
08:52 22 the overall system. In the SGI license, for example,  
08:52 23 SGI was willing to take it out. They paid \$95,000 which  
08:52 24 shows a de minimis value of the --

08:52 25 MR. VICKREY: Then let him focus on that.

08:52 1                   THE COURT: Okay. Well, I think the way  
08:52 2 to do to deal with this is to allow you to clarify  
08:52 3 the -- how this should be applied on cross-examination,  
08:53 4 and then we'll proceed that way.

08:53 5                   Thank you.

08:53 6                   (Bench conference concluded.)

08:53 7                   THE COURT: Mr. Reiter, you were  
08:53 8 inquiring.

08:53 9                   MR. REITER: Right, yes. Thank you, Your  
08:53 10 Honor. Just looking to see where I was.

08:53 11                 Q. (By Mr. Reiter) So have you seen any evidence  
08:53 12 that demonstrates that the accused feature is -- or this  
08:53 13 enhanced workspace, switching as you call it, is the  
08:53 14 basis of consumer demand?

08:53 15                 A. No. As we discussed, I haven't found any  
08:53 16 reason to believe that any consumer actually makes a  
08:53 17 decision to purchase this product or to acquire this  
08:53 18 product -- they don't purchase it. They acquire it.  
08:53 19 They don't download it.

08:53 20                 Nobody makes their decision to do that  
08:53 21 based on whether it's got enhanced workspace switching  
08:53 22 or not.

08:53 23                 Q. How does that play into how you value the  
08:53 24 patents?

08:53 25                 A. Well, again, all the things equal, that would

08:53 1 mean that you would reduce the price you would pay,  
08:54 2 particularly relative to situations where an -- if  
08:54 3 you're pricing it relative to add-on product.

08:54 4 If somebody buys this as an add-on, it's  
08:54 5 because they want it. But the vast majority of  
08:54 6 consumers don't consider this to be an important  
08:54 7 determinant of why you actually buy the product.  
08:54 8 They're not trying to add it onto their system. It just  
08:54 9 comes automatically, and they don't think about it.

08:54 10 Q. So did you prepare a chart that kind of shows  
08:54 11 the different factors you might look at to value the  
08:54 12 intellectual property or the patent?

08:54 13 A. Yes.

08:54 14 MR. REITER: If we could put up the  
08:54 15 adjustments chart, please.

08:54 16 Q. (By Mr. Reiter) Is this that chart?

08:54 17 A. Yes. So -- I'm sorry. Go ahead.

08:54 18 Q. Okay. I was going to say, if you could explain  
08:54 19 it.

08:54 20 A. Sure. So -- so remember we talked about -- so  
08:54 21 we have -- this is not rocket science. People pay about  
08:54 22 \$100,000 when they license these patents. The question  
08:54 23 is, is that the right number, or would you make some  
08:54 24 adjustments.

08:54 25 And so we just talked about some of these

08:54 1 adjustments that we would make, and you'll see there's  
08:55 2 eight of them that I put up here. And the first seven  
08:55 3 of them have one thing in common. And that is that if  
08:55 4 you were taking that adjustment into account, you would  
08:55 5 reduce that \$100,000 because of that factor.

08:55 6 So, for example, the first one on use,  
08:55 7 many of the Defendants' units can't infringe the patent  
08:55 8 because they don't have a display. Similarly, it's a  
08:55 9 tiny share of the total features in code in the entire  
08:55 10 product, so it can't be the basis of consumer demand.

08:55 11 Q. What about the passage of time, how does that  
08:55 12 play in?

08:55 13 A. That's, I guess, the fifth one down there.

08:55 14 THE WITNESS: Do I have a pointer?

08:55 15 A. There we go, passage of time right there.

08:55 16 Okay. So three of the four licenses were  
08:55 17 negotiated in the 1990s, and so as we all know from  
08:55 18 being consumers, prices change over time. Some prices  
08:55 19 go up over time; other prices go down over time, okay?

08:55 20 Software is one of those things whose  
08:55 21 price decreases over time. It's sort of like big TVs.  
08:56 22 I was looking at trying to figure out how much a  
08:56 23 big-screen plasma TV cost back in 2002, which is only  
08:56 24 eight years ago. It turns out that the average price of  
08:56 25 a big screen TV eight years ago was about \$6,000.

08:56 1                   So then I went to the Wal-Mart website and  
08:56 2 said, well, what do you buy a big-screen TV for today?  
08:56 3 Well, it's about \$700. So when you've got a long period  
08:56 4 of time since the licenses were negotiated, in this case  
08:56 5 about 15 years since the mid-1990s, you need to take  
08:56 6 that passage of time into account.

08:56 7                   And so what I did was go to the government  
08:56 8 website. It's called the Bureau of Labor Statistics.  
08:56 9 They track prices of everything that you could possibly  
08:56 10 want to buy, including the prices of software, and  
08:56 11 prices have gone down since the mid-1990s. And so if  
08:56 12 you were adjusting for that, for when the Defendants  
08:56 13 were actually negotiating ten years later, you would  
08:56 14 reduce the price.

08:56 15 Q. I see the last one is removal of uncertainty.  
08:56 16 What does that mean?

08:56 17 A. Well, this is something that came up a little  
08:56 18 bit with Mr. Gemini's testimony. One of the things that  
08:57 19 makes these licenses different from what's happening in  
08:57 20 the hypothetical negotiation -- remember, the  
08:57 21 hypothetical negotiation is just something we're  
08:57 22 imagining in our minds. It never actually happened.

08:57 23                   Or imagining these two parties, instead of  
08:57 24 fighting in the courtroom, we're imagining them  
08:57 25 bargaining at a bargaining table. The Plaintiffs have

08:57 1 already bargained at the bargaining table over these  
08:57 2 patents, but when they were bargaining in the past for  
08:57 3 real, they were bargaining over a patent that hadn't  
08:57 4 actually been fought out in court. Nobody knew whether  
08:57 5 it was invalid; nobody knew whether it was infringed.

08:57 6 If you folks decide that this patent is  
08:57 7 invalid and infringed, then that gives it sort of your  
08:57 8 seal of approval. It's more valuable to have a patent  
08:57 9 that's been found to be invalid and infringed than to  
08:57 10 have one that might be valid and infringed or might not  
08:57 11 be.

08:57 12 So in the past when we look at these  
08:57 13 licenses, they may have been discounted in price,  
08:57 14 because nobody knew whether a jury was going to find  
08:58 15 them valid and infringed or not.

08:58 16 If the Defendants are supposed to pay for  
08:58 17 a valid and infringed patent, they should pay more than  
08:58 18 people in the past have paid, because they're buying  
08:58 19 something that's more valuable.

08:58 20 Q. Now, let me interrupt you there, Dr. Putnam.

08:58 21 In the licenses that we've looked at,  
08:58 22 Central Point, HP, SGI, and Apple, was there litigation  
08:58 23 associated with any of those licenses?

08:58 24 A. There was litigation associated with the Apple  
08:58 25 license and with Central Point.

08:58 1 Q. Okay. And with respect to Central Point, was  
08:58 2 there this uncertainty about infringement?

08:58 3 A. Well, apparently not, because -- or if  
08:58 4 anything, it was reduced, because in Central Point,  
08:58 5 remember the agreement says we, Central Point, agree  
08:58 6 that we infringe these patents. And so they're not  
08:58 7 arguing anymore about whether they infringe, because  
08:58 8 that was their product; that's not Red Hat's product but  
08:58 9 a Novell product. But that was their product.

08:58 10 We agree that we infringe these patents,  
08:59 11 and so the question is, was the price they paid  
08:59 12 discounted? If you've already agreed that you  
08:59 13 infringed, then there's no longer any uncertainty about  
08:59 14 whether you infringe.

08:59 15 And that's actually something that the  
08:59 16 Court is enforcing. It's a consent judgment, not just  
08:59 17 an agreement. And so the Court and both parties agree  
08:59 18 that Central Point infringed. And in that case, you  
08:59 19 wouldn't discount the price for uncertainty about  
08:59 20 infringement.

08:59 21 Q. In your analysis, did you take this uncertainty  
08:59 22 into account?

08:59 23 A. Yes.

08:59 24 Q. How did you do that?

08:59 25 A. Well, I used a study by a woman named Kimberly

08:59 1 Moore, who was at the time a professor at George Mason  
08:59 2 University, is now actually a colleague of Judge Rader's  
08:59 3 on the federal circuit bench.

08:59 4 And she did a study of all the patent  
08:59 5 litigation in the United States, and she looked at the  
08:59 6 rate at which a patentee succeeds at trial, how often do  
09:00 7 patentees win.

09:00 8 And so one of the ways you might think  
09:00 9 about this discount is that the parties are sitting down  
09:00 10 and trying to bargain over a license, and they don't  
09:00 11 know whether a patent is -- who's going to win at trial.

09:00 12 They might say, well, how often does the  
09:00 13 plaintiff win. It turns out the plaintiff wins about 58  
09:00 14 percent of the time. Averaged over the entire country,  
09:00 15 averaged all patent trials, that's just the number.

09:00 16 Q. Now, we've heard some other numbers, I think,  
09:00 17 from the Plaintiffs' from other studies. Are you aware  
09:00 18 of those?

09:00 19 A. Yes. That's her study. I used that one.  
09:00 20 There are other studies that are generally in the  
09:00 21 similar range.

09:00 22 Q. Okay. There was some particular talk, I think,  
09:00 23 about a study by Mr. Janake?

09:00 24 A. Yes.

09:00 25 Q. What does that study say?

09:00 1 A. So Mr. Janake is -- now we're getting into  
09:00 2 academics here. But Mr. Janake is a professor of law,  
09:00 3 and he did another study, like Professor Moore's, and he  
09:00 4 looked at cases that only went up on appeal to the  
09:00 5 federal circuit. That's the highest sort of patent  
09:01 6 court in the land.

09:01 7 And he studied that particular subset of  
09:01 8 cases to see what the success rate was for the  
09:01 9 Plaintiffs in those cases.

09:01 10 Q. What did he find?

09:01 11 A. He found a success rate of about 25 percent.

09:01 12 Q. Do you think that study was appropriate or is  
09:01 13 meaningful?

09:01 14 A. Well, Professor Janake is a lawyer; he's not an  
09:01 15 economist; he's not a statistician. He's a very smart  
09:01 16 man, actually, but he made sort of a rookie mistake.

09:01 17 The rookie mistake is this: A lawyer  
09:01 18 would think, well, the important thing to do is to look  
09:01 19 at all the cases that are actually filed on appeal,  
09:01 20 because that way we have a final judgment. We have the  
09:01 21 highest court in the land determining whether these  
09:01 22 patents are valid or invalid, so let's look at these  
09:01 23 cases, because we can be certain about the results of  
09:01 24 these cases.

09:01 25 The problem is that when you look only at

09:01 1 the cases that get appealed, there are also the cases  
09:01 2 where the defendants have the best arguments. And so in  
09:01 3 cases where the defendants have the best arguments, the  
09:02 4 plaintiffs, the patentees, are also the most likely to  
09:02 5 lose.

09:02 6 And so all of this to say that the cases  
09:02 7 that Professor Janake looked at was not representative  
09:02 8 of the entire population.

09:02 9 Q. I'm sorry. I didn't mean to interrupt.

09:02 10 A. All I was going to say is it's sort of like  
09:02 11 this: Suppose you were the repair shop down at the Ford  
09:02 12 dealer, okay, and you looked at cars that came in for  
09:02 13 service, okay, and people brought their cars in, and  
09:02 14 they need spark plugs, and they've got flat tires, all  
09:02 15 kinds of adjustments, and there's all kinds of problems  
09:02 16 with the cars, okay?

09:02 17 You'd look at these cars and you'd say,  
09:02 18 man, the cars on the road today are in terrible shape.  
09:02 19 Transmissions are broken, headlights are out. All the  
09:02 20 cars are broken.

09:02 21 Well, if you thought that, that would be  
09:02 22 the wrong conclusion, because the only cars that are  
09:02 23 brought in for service are the ones that have something  
09:02 24 wrong with them. They don't represent all the cars on  
09:02 25 the road. They represent what an economist calls a

09:02 1 selected sample; it's a biased sample.

09:02 2 And Professor Janake used a biased sample,  
09:02 3 so that's why I didn't use his numbers.

09:03 4 Q. So if I understand correctly, you used a  
09:03 5 multiplier of, I think, 1.72, the 58 percent; is that  
09:03 6 right?

09:03 7 A. Yes. And so if you want to undo the  
09:03 8 discount -- remember we talked about the 59 percent --  
09:03 9 if you want to undo that discount, you just divide by  
09:03 10 .58, which means multiplying by 1.72. I'm sure there's  
09:03 11 no chart here to show you how this is done.

09:03 12 The thing you need to bear in mind is that  
09:03 13 on the last line here where you're trying to remove the  
09:03 14 effects of uncertainty and make sure that we compensate  
09:03 15 the Defendants adequately, we're going to take that  
09:03 16 100,000-dollar number, and we're going to multiply it by  
09:03 17 1.72 to increase damages up to \$172,000 so that we're  
09:03 18 sure that the Defendants (sic) are fully compensated.

09:03 19 They're going to pay -- the Plaintiffs are  
09:03 20 fully compensated. We're going to make sure the  
09:03 21 Defendants pay more than what other people have paid,  
09:03 22 because the Defendants are using a valid and infringed  
09:03 23 patent, if you folks find that.

09:03 24 Q. If you take all of the studies that were done  
09:04 25 or that you're aware of and you kind of average the

09:04 1 probabilities, what do you get?

09:04 2 A. You would get -- instead of 1.72, you'd get  
09:04 3 about 2.08, I think. I did the math, yeah.

09:04 4 Q. Is that substantially higher?

09:04 5 A. No. It would mean, instead of increasing the  
09:04 6 number up to \$172,000, you'd increase it up to about  
09:04 7 208,000, and so it's still very close.

09:04 8 Q. So did you prepare a chart that took into  
09:04 9 account or showed what you did with these adjustments?

09:04 10 A. Yes.

09:04 11 MR. REITER: Put up the next chart,  
09:04 12 please.

09:04 13 No, not that one.

09:04 14 A. Right. So here's what we did.

09:04 15 Q. (By MR. Reiter) Just quickly go through that.

09:04 16 A. Okay. So we're not going to go through each  
09:04 17 line of this, because you can divide all these lines  
09:04 18 into two groups. There's what I did and what I didn't  
09:04 19 do, okay?

09:04 20 The first seven things are reasons why you  
09:05 21 would reduce the damages. They don't use all the units;  
09:05 22 it's a tiny feature; you only need a license in the  
09:05 23 U.S.; it's a short period of time.

09:05 24 And what I decided to do was disregard all  
09:05 25 of those reasons for reducing the damages. So you have

09:05 1 that 100,000-dollar number. You could take that down.  
09:05 2 You could take each one of these seven reasons and you  
09:05 3 could nickel-and-dime your way down to some smaller  
09:05 4 number. I didn't do that.

5 Q. What did you do?

09:05 6 A. I just kept it at \$100,000.

09:05 7 Q. Then what did you do?

09:05 8 A. The one thing I did do is the bar in the  
09:05 9 yellow, and that's increase it. There's one factor that  
09:05 10 would cause you to increase the damages, and that's  
09:05 11 eliminating this uncertainty.

09:05 12 And I did do that, so we kept it at  
09:05 13 \$100,000. We didn't chisel away at that, and then we  
09:05 14 increased it up to 172,000 to remove the effects of any  
09:05 15 litigation discount.

09:05 16 Q. And you did that even though there was only one  
09:05 17 case, the Apple case, in which that litigation discount  
09:05 18 really seemed to apply?

09:05 19 A. That's right.

09:05 20 Q. Now, would you say that this is a conservative  
09:06 21 approach or more of an aggressive approach?

09:06 22 A. No, I would say it's conservative. We're  
09:06 23 trying to do everything we can -- you'll hear about the  
09:06 24 law -- but the statute says the damages have to be  
09:06 25 adequate to compensate the patentee.

09:06 1 So I wanted to make sure that if I made  
09:06 2 any mistakes, I made them in favor of the patentee. And  
09:06 3 so I ignored all the reasons for reducing damages and I  
09:06 4 included the one reason for increasing the damages.

09:06 5 Q. Now, what was your final conclusion? If the  
09:06 6 patents were valid and infringed, what do you think that  
09:06 7 the damages should be that Red Hat would pay?

09:06 8 A. The final conclusion is \$172,000 in a lump-sum  
09:06 9 payment all in.

09:06 10 Q. Okay. And what about Novell?

09:06 11 A. And so for Novell, Novell is actually much  
09:06 12 smaller than Red Hat measured by revenue. We know that  
09:06 13 revenue plays a role in the size of the overall payment.  
09:06 14 Since Novell is about a tenth of the size, they'd pay  
09:06 15 about a tenth less, if you were adjusting for revenue,  
09:07 16 then that would be one-tenth of 172,000, which is  
09:07 17 17,200.

09:07 18 Q. So \$172,000 for Red Hat; is that right?

09:07 19 A. Yes.

09:07 20 Q. And \$17,200 for Novell?

09:07 21 A. If you were adjusting based on revenue; that's  
09:07 22 right.

09:07 23 Q. Okay. And that's your opinion of damages?

09:07 24 A. Yes.

09:07 25 Q. Okay. Now, let's finish up. I think you had

09:07 1 some things you wanted to talk about with respect to  
09:07 2 Mr. Gemini's analysis; is that right?

09:07 3 A. That is right.

09:07 4 Q. Okay. Do you agree with his analysis?

09:07 5 A. No.

09:07 6 Q. What's wrong with it?

09:07 7 A. Well, I think there's four things. Mr. Gemini  
09:07 8 remember -- it's going to be sort of the opposite of  
09:07 9 what we just heard.

09:07 10 Mr. Gemini says that the agreement  
09:07 11 shouldn't be a lump sum; it should be a running royalty;  
09:07 12 it should be pay as you go. I disagree with that.

09:07 13 If it's a pay-as-you-go license, then  
09:07 14 Mr. Gemini has to compute both the royalty rate and the  
09:07 15 royalty base. I think his royalty rate is inflated.  
09:07 16 The ticket price is too high. And I think the royalty  
09:07 17 base is inflated, the number of rides that he goes on.

09:08 18 Q. Okay. So let's talk about the rate first.

09:08 19 A. Sure --

09:08 20 Q. -- all right?

09:08 21 Do you recall what Mr. Gemini was saying  
09:08 22 was the per-unit rate?

09:08 23 A. 62 cents.

09:08 24 Q. Okay. And do you recall briefly how he got  
09:08 25 there?

09:08 1       A. Yeah. Mr. Gemini took the -- he ignored the  
09:08 2 two operating system licenses, even though the  
09:08 3 Defendants sell operating systems, and he focused on the  
09:08 4 two add-on licenses; that's the HP and Central Point.

09:08 5                             HP, he said, was a 99-cent royalty per  
09:08 6 unit, and Central Point is 25 cents per unit, and he  
09:08 7 just averaged those, added them up together and divided  
09:08 8 by two and came up with 62 cents.

09:08 9       Q. Okay. Now, where did he get the 99 cents from?

09:08 10      A. Well, Mr. Gemini got 99 cents, because,  
09:08 11 remember, in the HP license, there was this kicker at  
09:08 12 the end that said if you ever get to \$10 million in  
09:08 13 sales, then you pay at a 1-percent royalty rate. That  
09:08 14 never happened. He's using that 1-percent number.

09:09 15                             And then he's saying, well, okay, let's --  
09:09 16 that's something that would have happened in the future,  
09:09 17 if it ever happened at all. Then he says, let's look  
09:09 18 back in the past at what HP actually charged. They  
09:09 19 actually charged 99 cents.

09:09 20                             So he takes the past price from HP, and he  
09:09 21 takes the future 1 percent that Borland might charge  
09:09 22 some day, and he multiplies them together and gets  
09:09 23 1 percent of \$99, and that's 99 cents.

09:09 24      Q. If you just look at the period of the 12.5  
09:09 25 million and the \$10 million in that license on the

09:09 1 \$110,000, is there some percentage that you can  
09:09 2 calculate?

09:09 3 A. Right. So -- in the real world, what actually  
09:09 4 happened was that HP sold 12 million dollars' worth of  
09:09 5 stuff, and Borland was licensed to sell another 10  
09:09 6 million dollars' worth of stuff, 22 million.

09:09 7 They paid \$110,000 for those rights. If  
09:09 8 you ask yourself, what percentage is that, what  
09:10 9 percentage of the total sales is that payment, it's  
09:10 10 one-half of 1 percent.

09:10 11 Q. And what would you apply that one-half of 1  
09:10 12 percent to?

09:10 13 A. Well, if you were looking at the one-half of  
09:10 14 1 percent to the licenses going forward from the day it  
09:10 15 was actually signed to the product -- remember, on the  
09:10 16 day that the license is signed, the Dashboard product,  
09:10 17 the HP product, transfers from HP to Borland. And  
09:10 18 Borland says, we thought HP was selling it for too much  
09:10 19 money; we're going to drop the price.

09:10 20 So Borland is going to sell it for \$49.  
09:10 21 If you take a half percent of \$49, that would be 25  
09:10 22 cents.

09:10 23 Q. Did you actually look at some of the prices  
09:10 24 that Borland published? Was it only \$49?

09:10 25 A. No. That was what they wanted to charge the

09:10 1 day they got the product. Of course, they had trouble  
09:10 2 selling it, too, and so they cut the price down to \$39,  
09:10 3 and then it eventually it became one of these things  
09:10 4 they just gave away, like buy some other product and  
09:10 5 we'll give you Dashboard free.

09:10 6 So it went from 49 to 39 and eventually,  
09:11 7 at least at times, we know it was given away for  
09:11 8 nothing.

09:11 9 Q. So did you try and calculate a per-unit rate of  
09:11 10 the HP license based on the information in evidence that  
09:11 11 you had?

09:11 12 A. Well, if you were going to assume an average  
09:11 13 price, knowing that it was never any more than 50 and it  
09:11 14 could be as low as 0, and they actually did sell it for  
09:11 15 40, for the purposes of figuring out what Mr. Gemini  
09:11 16 ought to have done, I said, let's use \$40 as the average  
09:11 17 price.

09:11 18 Q. And then did you come up with a per-unit rate?

09:11 19 A. Yes. And so if you took a half a percent,  
09:11 20 which we agreed was the actual effective royalty rate in  
09:11 21 the real world, times this 40-dollar price, a half a  
09:11 22 percent of \$40 is 20 cents per unit.

09:11 23 Q. So you think that if you're looking at the HP  
09:11 24 license, it would be 20 cents per unit, not 99 cents per  
09:11 25 unit; is that right?

09:11 1       A. Well, no, because then you've got all the  
09:11 2 adjustments that you've got to make, which is what  
09:11 3 Mr. Gemini also didn't do.

09:11 4       Q. Okay. What kind of adjustments?

09:12 5       A. Well, this was the list of seven things that I  
09:12 6 disregarded, because I wanted to make sure that I  
09:12 7 compensated the patentees fairly, but Mr. Gemini should  
09:12 8 have looked at at least some of these and tried to  
09:12 9 adjust his rate; otherwise, I think he's overreaching.

09:12 10           So, for example, Mr. Gemini didn't take  
09:12 11 into account the fact that prices have fallen over time.

09:12 12       Q. Did you look at any statistics to determine how  
09:12 13 much software prices had fallen?

09:12 14       A. Yes. Software prices fell about 26 percent  
09:12 15 from the time that HP negotiated their license to the  
09:12 16 time that these parties would have sat down to bargain.  
09:12 17 And so if you reduce that 20 cents by the same amount,  
09:12 18 it would take it down to about 15 cents.

09:12 19       Q. Do you recall I asked Mr. Gemini some questions  
09:12 20 about usage and a survey, 38 percent? Remember that?

09:12 21       A. Yes.

09:12 22       Q. Did Mr. Gemini take that into account?

09:12 23       A. Well, no, he disregarded that. Mr. Gemini had  
09:12 24 a survey which the -- it was a survey about something  
09:12 25 called virtualization. Virtualization has nothing to do

09:13 1 actually with the workspace switching feature, but that  
09:13 2 survey used a figure of 38-percent usage.

09:13 3 I think it's wrong. It has nothing to do  
09:13 4 with anything. But if you were going to use that  
09:13 5 figure, then you should adjust your royalty rate by the  
09:13 6 share of people that actually use the invention. And so  
09:13 7 you should take that royalty rate down by 38 percent.  
09:13 8 That would take it from 15 cents down to about 5 cents.

09:13 9 Q. Okay. And what do you do? You're at 5 cents.  
09:13 10 Do you stop?

09:13 11 A. Well, no. Then we still have the fact that the  
09:13 12 HP -- we wanted to adjusts for any uncertainty about  
09:13 13 litigation. I'm going to give the benefit to the  
09:13 14 Plaintiffs, the benefit of every doubt. And so we're  
09:13 15 going to multiply that number back up to 1.72 again.

09:13 16 So when all is said and done and you make  
09:13 17 all these adjustments, you get a figure of about 9.6  
09:13 18 cents per unit.

09:13 19 Q. So that's what you think the effective per-unit  
09:13 20 royalty would be for HP, 9.6 cents per unit?

09:13 21 A. Again, if you were doing it Mr. Gemini's way,  
09:13 22 okay? It's not just what you pay; it's how you pay it.

09:14 23 And so you shouldn't be paying it on a  
09:14 24 per-unit basis, but if you were doing it that way, 9.6  
09:14 25 cents is the number you'd come up with.

09:14 1 Q. Now, what about the Central Point license very  
09:14 2 briefly?

09:14 3 A. Yeah. And so if you did the same thing with  
09:14 4 Central Point and go through all the adjustments we just  
09:14 5 talked about, that would be a little bit larger number,  
09:14 6 and that would be about 12 cents.

09:14 7 Q. Okay. What about Apple, did you take a look at  
09:14 8 Apple at all?

09:14 9 A. Yes.

09:14 10 Q. Okay. What did you look at?

09:14 11 A. Well, remember, Apple is structured as a  
09:14 12 lump-sum license. And so what you want to do is make  
09:14 13 sure that -- you want to -- again, if you're going to  
09:14 14 think about per-unit terms, if you're going to try to  
09:14 15 convert that lump sum into a pay-as-you-go license, you  
09:14 16 need to figure out how many units Apple actually paid  
09:14 17 for.

09:14 18 Q. Okay. And did you do an analysis?

09:14 19 A. Yeah. I think we've got the illustration of  
09:14 20 the numbers for the jury to follow. You can see the  
09:14 21 math here.

09:14 22 THE COURT: Mr. Vickrey?

09:14 23 MR. VICKREY: Same objection. Perhaps a  
09:14 24 sidebar, Your Honor?

09:14 25 (Bench conference.)

09:15 1 MR. VICKREY: This is back six years, that  
09:15 2 they can't get -- Your Honor told us -- said yesterday  
09:15 3 that if they do this, you were going to say it doesn't  
09:15 4 include sales, in the jury instructions. They just did  
09:15 5 it.

09:15 6 MR. REITER: I disagree. No, we talked  
09:15 7 about closing and I disagree. Mr. Gemini was able to  
09:15 8 present his evidence his way. If he wants to  
09:15 9 cross-examine Dr. Putnam on this issue, I think he  
09:15 10 should be permitted. We are not going to argue sales to  
09:15 11 the jury.

09:15 12 MR. VICKREY: It's on that chart.

09:15 13 THE COURT: I think in our discussion I  
09:15 14 said that if that was argued in closing, I would make an  
09:15 15 addition to my jury instructions, and I will.

09:15 16 MR. VICKREY: Then it's 403.

09:15 17 THE COURT: But in terms of what they can  
09:15 18 present, I think I'm allowing both parties to present  
09:15 19 their theories pretty openly. I don't think I  
09:16 20 restricted Mr. Gemini, and I'm not going to restrict  
09:16 21 Mr. Putnam either.

09:16 22 Thank you.

09:16 23 (Bench conference concluded.)

09:16 24 MR. REITER: If we could get the chart  
09:16 25 back up.

09:16 1 Q. (By Mr. Reiter) Now, what does this show,  
09:16 2 briefly?

09:16 3 A. Everybody loves math as much as I do, and so I  
09:16 4 thought I'd just give you a chance to all go through it  
09:16 5 with me.

09:16 6 And so what we have is, we're trying to  
09:16 7 figure out what did Apple pay on a per-unit basis, okay?  
09:16 8 So we can all do it together. Apple paid 1.25 million  
09:16 9 in their license, okay? I went back and I looked at  
09:16 10 Apple's annual reports from 2001 to 2008 to see how many  
09:16 11 units worldwide of Macintosh computers they actually  
09:16 12 sold. And that's about 39 million units.

09:16 13 Q. Why worldwide?

09:16 14 A. Because the Apple license agreement is a  
09:16 15 worldwide license agreement.

09:16 16 Q. Okay. Go on.

09:17 17 A. And so on a per-unit basis, that works out to  
09:17 18 3.2 cents. That's what the third line is, the effective  
09:17 19 royalty rate per unit.

09:17 20 Now, remember, there was litigation  
09:17 21 involved in the Apple case, and so we want to remove the  
09:17 22 effects of -- any litigation discount that the parties  
09:17 23 might have agreed to. So that's going to multiply by  
09:17 24 1.72. That's takes it up to about 5-1/2 cents adjusted  
09:17 25 per unit from the Apple agreement.

09:17 1 Q. I think we're getting ahead of ourselves, but  
09:17 2 you went ahead and multiplied it out times the base to  
09:17 3 get a damages number; is that right?

09:17 4 A. Sure. We were talking about the rate, and  
09:17 5 so -- but just -- because this chart shows the whole  
09:17 6 thing, I might as well just get to the bottom line.

09:17 7 So if you actually look at the data that  
09:17 8 Red Hat -- I just did it for Red Hat here -- that Red  
09:17 9 Hat's provided on what's called the GNOME package, which  
09:17 10 is the package that contains the workspace switching  
09:18 11 feature we've been talking about, there was about 1 --  
09:18 12 almost 1.4 million units that are in the United States  
09:18 13 that contain that feature.

09:18 14 1.4 million units at 5-1/2 cents per unit  
09:18 15 works out to about \$76,000.

09:18 16 Q. Did you also kind of just look at -- I don't  
09:18 17 think we have a chart for this -- Apple, if you only  
09:18 18 talked about from the time the license was executed?

09:18 19 A. Sure. So let's suppose that you couldn't go  
09:18 20 back in time six years, okay? And Apple was only paying  
09:18 21 for the right to sell its product going forward, okay?

09:18 22 In that case, it would be many fewer  
09:18 23 units. And so the chart would look exactly the same  
09:18 24 except the second line, instead of being licensed units  
09:18 25 for 2001 through 2008, it would be licensed units for

09:18 1 2007 to 2008, the date of the license forward.

09:18 2 Q. What did that number, adjusted royalty rate,  
09:19 3 turn out to be?

09:19 4 A. It works out to, I think, 14 -- you get the  
09:19 5 bottom line, it's about 14 cents. And the very bottom  
09:19 6 line, the payment is about \$218,000. So it could be as  
09:19 7 high as that, if that's how you interpreted the Apple  
09:19 8 license.

09:19 9 Q. Okay. Let's go on to the SGI license.

09:19 10 A. Okay.

09:19 11 Q. Now, did Mr. Gemini use that license?

09:19 12 A. No.

09:19 13 Q. Is it possible or did you have enough  
09:19 14 information to compute a per-unit royalty on the SGI  
09:19 15 license?

09:19 16 A. No, there's just not enough information to  
09:19 17 figure out the number of units that SGI actually sold.

09:19 18 Q. Okay. So what did you do with the SGI license?

09:19 19 A. Well, the SGI license -- it's sort of is what  
09:19 20 it is. They paid \$95,000 and they got to sell as many  
09:19 21 units as they wanted. That was the deal.

09:19 22 Q. Now, let's turn to the royalty base, and that's  
09:19 23 the number of units that need to be paid for; is that  
09:19 24 right?

09:19 25 A. Yes.

09:19 1 Q. Okay. Do you agree with the way Mr. Gemini  
09:20 2 calculated the base?

09:20 3 A. No.

09:20 4 Q. Okay. Why not?

09:20 5 A. Well, the jury's already heard at length that  
09:20 6 the first problem is that the number of IP addresses,  
09:20 7 which is the number of addresses of computers in the  
09:20 8 world, bears no relationship to the number of users or  
09:20 9 units that are actually using the software, which is  
09:20 10 something that the -- neither Red Hat nor Novell  
09:20 11 actually tracks.

09:20 12 Q. So let's start with Novell. Okay. What did  
09:20 13 Mr. Gemini use?

09:20 14 A. Well, for Novell, Novell actually produced  
09:20 15 their unique IP addresses, and so whatever this means,  
09:20 16 they counted the number of addresses in the United  
09:20 17 States, and they counted the number of addresses  
09:20 18 worldwide.

09:20 19 And then Mr. Gemini used the number of  
09:20 20 U.S. addresses as his royalty base; that's the number of  
09:20 21 units that he says should be paid for on this  
09:20 22 pay-as-you-go basis.

09:20 23 Q. Do you recall what that number was?

09:20 24 A. About 1.1 million.

09:21 25 Q. 1.8 million?

09:21 1 A. 1.8 million. I'm sorry. 1.8 million. Yes.

09:21 2 Q. Okay. And that's of openSUSE?

09:21 3 A. Yes. That's for the -- for the R&D project,  
09:21 4 the non-revenue-generating part of Novell.

09:21 5 Q. Okay. Now, let's turn to Red Hat. What did  
09:21 6 Mr. Gemini do?

09:21 7 A. Well, for Red Hat, Red Hat produced the same  
09:21 8 information. They produced the worldwide number of IP  
09:21 9 addresses, and then they produced the share of those  
09:21 10 addresses that are in the U.S. or the exact number, not  
09:21 11 the --

09:21 12 MR. REITER: Can we pull up DX904, please?

13 Q. (By Mr. Reiter) What are you talking  
09:21 14 about here?

09:21 15 A. Yes. If you look at the bottom line, that's  
09:21 16 the number we actually care about. So this is for the  
09:21 17 14-month period covered by the patent. It's not a very  
09:21 18 friendly -- easy-to-read number, but the number on the  
09:21 19 left is the number of IP addresses, whatever that means,  
09:22 20 in the United States. And the number on the right is  
09:22 21 the number of IP addresses outside the United States.

09:22 22 So if you add them together, that's  
09:22 23 worldwide. So just to read the numbers so everyone  
09:22 24 knows them, it's 1,537,441 in the United States and  
09:22 25 8,253,509 million outside the United States.

09:22 1 Q. What did Mr. Gemini do?

09:22 2 MR. REITER: If we could put up PX321,  
09:22 3 Schedule 1, please.

09:22 4 A. So Mr. Gemini ignored all that. He didn't do  
09:22 5 the same thing that he did with Novell. He went back  
09:22 6 and computed the number of IP addresses, not from what  
09:22 7 Red Hat actually said but from an article that he  
09:23 8 got in -- that he found on the internet somewhere.

09:23 9 MR. REITER: The last page, Schedule 1,  
09:23 10 not Paragraph 1. I'm sorry. There we go.

09:21 11 Q. (By Mr. Reiter) So he had the Fedora units at  
09:23 12 6.7 million. Is that a worldwide number?

09:23 13 A. Yes.

09:23 14 Q. Okay. And he had the RHEL units at 570,000?

09:23 15 A. Yes.

09:23 16 Q. That's a worldwide number?

09:23 17 A. Yes.

09:23 18 Q. And he added those up, and then what did he do  
09:23 19 to account for just the U.S.?

09:23 20 A. Well, you can see there his adjustments. He's  
09:23 21 got about 7.2 million, and then he -- of course, these  
09:23 22 are U.S. patents, and so we have to get the U.S. share,  
09:23 23 and he multiplies it by 55 percent.

09:23 24 But instead of using the actual U.S.  
09:23 25 numbers, which Red Hat provided, he just said, well,

09:23 1 let's take RHEL, which is the part of Red Hat that  
09:23 2 actually makes money, and let's look at the share of  
09:23 3 RHEL revenues that are attributable to the U.S. and  
09:24 4 let's multiply that. And that's 55 percent, because  
09:24 5 most of the money you make -- because the U.S. is a  
09:24 6 wealthy country, most of the money you make on this  
09:24 7 comes from the U.S. and so let's apply that to the  
09:24 8 worldwide share of all the IP addresses, and that gives  
09:24 9 him about 4 million.

09:24 10 Q. Does that revenue number have anything to do  
09:24 11 with Fedora?

09:24 12 A. No. Fedora doesn't make revenue. There's no  
09:24 13 revenue associated with it, and it has nothing to do  
09:24 14 with the IP addresses associated with Fedora. The two  
09:24 15 concepts are completely unrelated.

09:24 16 Q. Do you believe that it's appropriate to take  
09:24 17 the revenue -- the revenue information or percentage and  
09:24 18 apply it to Fedora?

09:24 19 A. Well, it's not appropriate in general, and it's  
09:24 20 particularly not appropriate when you know the true  
09:24 21 number. Red Hat has provided the true number. If you  
09:24 22 actually look at what the number is based on the figures  
09:24 23 that Red Hat provided, the true number is about 15  
09:24 24 percent, not 55 percent.

09:24 25 So you know for certain -- you know for

09:24 1 certain -- and this is actually important -- that if you  
09:25 2 were to use Mr. Gemini's numbers, you're going to be  
09:25 3 bringing in IP addresses from outside the United States  
09:25 4 and asking the Defendants to pay damages on them as  
09:25 5 though they were inside the United States. And that's  
09:25 6 just flat wrong.

09:25 7 Q. Okay. Let's talk about what you did when you  
09:25 8 borrowed Mr. Gemini's analysis.

09:25 9 MR. REITER: If we could put up DX936,  
09:25 10 please, Page 45.

09:25 11 Q. (By Mr. Reiter) And do you know what this is?

09:25 12 A. Yes. This is one of the -- this is the second  
09:25 13 of the two reports that I filed in this case.

09:25 14 Q. Okay.

09:25 15 MR. REITER: So if we could highlight or  
09:25 16 zoom in on the 106(a) paragraph.

09:25 17 Q. (By Mr. Reiter) So could you explain what this  
09:25 18 is?

09:25 19 A. Yes. So unlike Mr. Gemini, I took the actual  
09:25 20 numbers that Red Hat used. There's -- remember those  
09:25 21 two numbers we talked about earlier, the 1.5 million and  
09:26 22 the 8.2 million, if you add those together, it comes out  
09:26 23 to about 9.79 million units of Fedora, or it's called  
09:26 24 downloads, but what we really mean is these are the IP  
09:26 25 addresses for Fedora.

09:26 1                   And so what that means is that the U.S.  
09:26 2 portion is about 15.7 percent. That's for Fedora. And  
09:26 3 then for RHEL, I just -- since we're trying to correct  
09:26 4 Mr. Gemini and get to a number that he ought to have  
09:26 5 gotten to, he said there were 570,000 worldwide RHEL  
09:26 6 units. And for RHEL, I did follow his procedure and  
09:26 7 multiplied by 55 percent.

09:26 8       Q.     And why did you do that for the RHEL?

09:26 9       A.     Because in this case if you got -- the only --  
09:26 10 they don't track IP addresses for RHEL, and so the only  
09:26 11 thing you've got is revenues. And so you're trying to  
09:26 12 figure out -- you've got worldwide units and you want to  
09:26 13 figure out the U.S. portion, and the only way to  
09:26 14 allocate the U.S. portion is based on the U.S. money.

09:27 15                   And so for RHEL, which generates money, it  
09:27 16 makes more sense at least to look at the share of those  
09:27 17 units that are proportional to U.S. revenue.

09:27 18       Q.     So RHEL generates revenue; Fedora does not; is  
09:27 19 that right?

09:27 20       A.     That's exactly right.

09:27 21       Q.     So that's why it's okay to use the 55 percent  
09:27 22 for RHEL?

09:27 23       A.     It's the best you can -- I mean, frankly, we're  
09:27 24 in Alice in Wonderland here, but if you're going to do  
09:27 25 that, this is the best you can do.

09:27 1 Q. Okay. Let's get to your conclusion.

09:27 2 MR. REITER: If we could go to Page 46,  
09:27 3 please, and zoom in on Paragraph 110.

09:27 4 Q. (By Mr. Reiter) Now, did you do anything else  
09:27 5 to account for the base?

09:27 6 A. Yes, a lot of adjustments in this case. The  
09:27 7 only other adjustment is that -- remember, we talked  
09:27 8 about this earlier. The -- there's a particular package  
09:27 9 that has the accused feature in it. It's called GNOME.

09:28 10 And so for Red Hat, about 75 percent --  
09:28 11 the best evidence is about 75 percent of these units had  
09:28 12 GNOME installed. For Novell, it's about 37 percent.  
09:28 13 And so you've got to take those numbers down from about  
09:28 14 1.8 million down, in the case of Red Hat, to about 1.4  
09:28 15 million; and in the case of Novell, a little  
09:28 16 less 500,000.

09:28 17 Q. Do you recall if there was a typo in  
09:28 18 Paragraph B?

09:28 19 A. Oh, actually, yes. I didn't catch that. I'm  
09:28 20 sorry. I said 37 percent, and it should have been --  
09:28 21 the math is right, as I recall. It should be 27  
09:28 22 percent, .27 for Novell.

09:28 23 Q. Okay. Now, is that what you think the  
09:28 24 appropriate royalty base would be for Red Hat and  
09:28 25 Novell -- 1.4 million units and 484,000 for Novell?

09:28 1       A. If you're going to follow Mr. Gemini's  
09:28 2 procedures, then this is the best -- this would have  
09:28 3 been the way you should have done it.

09:28 4       Q. Okay. Do you agree with that process, that  
09:29 5 methodology?

09:29 6       A. No. As I've said, we have now made -- you  
09:29 7 know, it's not what you pay; it's how you pay it. We  
09:29 8 should be paying on a lump-sum basis. This is only if  
09:29 9 you believed that you were going to pay on a running  
09:29 10 royalty.

09:29 11       Q. Okay. So now you have to take this base and  
09:29 12 multiply it by a rate?

09:29 13       A. Yes; that's right.

09:29 14                   MR. REITER: If we could go to the next  
09:29 15 paragraph, 111.

09:29 16       Q. (By Mr. Reiter) Did you do that?

09:29 17       A. Yes.

09:29 18       Q. So what did you come up with?

09:29 19       A. So remember, we said that we had various sort  
09:29 20 of per-unit rates that you could have come up with in  
09:29 21 this case. We had about 5-1/2 cents from the Apple  
09:29 22 agreement, 9-1/2 cents from the HP agreement, 12 cents  
09:29 23 from the Central Point agreement.

09:29 24                   So we can all do the math. I picked the  
09:29 25 middle one, which is 9-1/2 cents. If you do this, if

09:29 1 you follow Mr. Gemini's logic and use the right numbers  
09:29 2 and correct all the mistakes, you'd get to the bottom  
09:29 3 line. If you were doing it that way, you would get a  
09:30 4 number of about 133,000 for Red Hat and about 46,000 for  
09:30 5 Novell.

09:30 6 Q. So this would be what you think, using  
09:30 7 Mr. Gemini's analysis, the appropriate measure of  
09:30 8 damages for Red Hat and Novell?

09:30 9 A. Yes. In Mr. Gemini's world, using the right  
09:30 10 numbers, this is what you'd get to as a bottom line.

09:30 11 Q. Okay. So wrapping everything up, Dr. Putnam,  
09:30 12 what is your ultimate opinion here, if the patents were  
09:30 13 to be found valid and infringed?

09:30 14 A. If the folks on the jury find the patents valid  
09:30 15 and infringed, in my opinion, the number should be a  
09:30 16 lump-sum payment, one lump-sum payment of \$172,000 for  
09:30 17 Red Hat and \$17,200 for Novell.

09:30 18 Q. And I just want to be clear. You're not saying  
09:30 19 that you have an opinion about whether the patents are  
09:30 20 valid or infringed, do you?

09:30 21 A. No. This is only if the car is for sale is the  
09:30 22 appraiser's opinion relevant.

09:30 23 MR. REITER: Pass the witness, Your Honor.

09:30 24 MR. VICKREY: Your Honor, I have a few  
09:31 25 questions.

09:31 1                   THE COURT: Thank you, Mr. Vickrey. You  
09:31 2 may proceed.

09:31 3                   CROSS-EXAMINATION

09:31 4 BY MR. VICKREY:

09:31 5       Q. Good morning, Dr. Putnam.

09:31 6       A. Good morning, Mr. Vickrey.

09:31 7       Q. We met last week?

09:31 8       A. Yes.

09:31 9       Q. Sir, did I hear you say that there's a  
09:31 10 correlation between revenue and how you calculate  
09:31 11 damages in this case, like between Red Hat and Novell?

09:31 12      A. There's some evidence that you would scale the  
09:31 13 size of the payment based on revenue. For example, the  
09:31 14 Apple agreement is larger than other agreements that the  
09:32 15 parties -- that the Plaintiffs have negotiated.

09:32 16      Q. I'm not talking about Apple. Let's just talk  
09:32 17 about Red Hat and Novell.

09:32 18                  Did I hear you tell the jury that what you  
09:32 19 do to figure out the relative size of the damage awards  
09:32 20 is you look at revenue of Red Hat against revenue of  
09:32 21 Novell? And that's what you did?

09:32 22      A. Frankly, it's an open question about whether  
09:32 23 you should adjust for revenue.

09:32 24                  What we've seen is that if you do look at  
09:32 25 revenue, which we know is important since that's how

09:32 1 companies make money, you would adjust based on revenue.  
09:32 2 And if you did that, the factor would be about 10  
09:32 3 percent for Novell, yes.

09:32 4 Q. I'm not talking about make-believe. That's  
09:32 5 what you actually told the jury you did?

09:32 6 A. Yes, that is right.

09:32 7 Q. So you used the relative revenue base to  
09:32 8 calculate the damages between Red Hat and Novell,  
09:32 9 correct?

09:32 10 A. Once you've gotten to a lump-sum figure, yes.

09:32 11 Q. Okay. Did I hear you say that Red Hat and  
09:32 12 Novell had actually produced usage figures in this case?

09:33 13 A. I don't think you did, because they haven't.

09:33 14 Q. Well, I think I heard you say, well, if you  
09:33 15 look at what Red Hat produced about use and what Novell  
09:33 16 produced about use, this is what you get.

09:33 17 A. Well, if by use you mean IP addresses, then  
09:33 18 they both produced information about IP addresses;  
09:33 19 that's true.

09:33 20 Q. What did Novell produce? You heard Mr. Gemini  
09:33 21 say they didn't produce anything, so he had to go out  
09:33 22 and find it on the internet, right?

09:33 23 A. Well, if I -- if I understand the genesis  
09:33 24 correctly, he downloaded it from Novell's website.

09:33 25 Q. But Novell didn't produce a thing, right?

09:33 1 A. Well, if you're talking about as a matter of  
09:33 2 legal procedure, I'm not sure exactly how Mr. Gemini got  
09:33 3 the numbers. They're Novell's numbers and Novell stands  
09:33 4 by them.

09:33 5 Q. To this day, have you seen anything that Novell  
09:33 6 has produced about the number of users of even its  
09:34 7 commercial product, its enterprise product, SLED, not  
09:34 8 openSUSE? Have you seen a single document produced by  
09:34 9 Novell?

09:34 10 A. I think the testimony is clear that they don't  
09:34 11 track those numbers. The answer to your question is,  
09:34 12 no, I haven't seen them, because they don't exist.

09:34 13 Q. Not even internet addresses, right?

09:34 14 A. I don't know what Novell -- how they use them  
09:34 15 internally.

09:34 16 Q. Well, you haven't seen any even IP addresses  
09:34 17 for the use of its commercial product, correct?

09:34 18 A. That is true, yes.

09:34 19 Q. They didn't give it to you?

09:34 20 A. Yes. The addresses I've seen are for openSUSE  
09:34 21 only; that's right.

09:34 22 Q. And you didn't ask for them, right?

09:34 23 A. I don't think they exist.

09:34 24 Q. Did you ask?

09:34 25 A. I was told they did not exist.

09:34 1 Q. Who told you that?

09:34 2 A. I'm sure it was counsel for Novell or -- yeah.

09:34 3 Q. Does it strike you as odd that they would --

09:35 4 they would keep IP addresses for the free stuff they

09:35 5 give away but not keep it for the stuff -- their

09:35 6 enterprise product that they actually make money from?

09:35 7 A. No.

09:35 8 Q. That's perfectly normal to you?

09:35 9 A. They don't track -- IP addresses are not users;

09:35 10 they aren't customers; they don't have anything to do

09:35 11 with the actual number of copies of the software. We're

09:35 12 using something we know is irrelevant, because it's the

09:35 13 only thing available to count.

09:35 14 Q. Sir, you've heard sworn testimony in this case

09:35 15 by deposition that Novell has two different per-unit

09:35 16 licenses: One's Via and one's for MPEG, right?

09:35 17 A. Yes.

09:35 18 Q. And how in the world could they keep track of

09:35 19 the royalties for those running royalty licenses,

09:35 20 including the MPEG license, not the one with the cap,

09:35 21 the other one, if they don't track it? Strike you as

09:35 22 odd?

09:35 23 A. Well, I -- first of all, I haven't seen the

09:36 24 terms of the license, so I don't know exactly the number

09:36 25 that's being tracked. Obviously, they're able to

09:36 1 perform under the agreement, and obviously the agreement  
09:36 2 has got a cap on it, and so functionally, what happens  
09:36 3 is that they don't track. They just write a check every  
09:36 4 year for the same amount of money, because they hit the  
09:36 5 cap.

09:36 6 Q. All right. I want to briefly revisit your  
09:36 7 background, sir. Courts have rejected your opinions in  
09:36 8 the past?

09:36 9 A. I've had a judge disagree with me; that's true.

09:36 10 Q. All right. It's more than one, though?

09:36 11 A. No. That's not true.

09:36 12 Q. Let's talk about the Beidleman case. Now, in  
09:36 13 the Beidleman case, the judge in -- the federal judge in  
09:36 14 the Denver court excluded your opinions, refused to let  
09:36 15 you testify, correct?

09:36 16 A. Yes, that is true. But that's based on  
09:36 17 exclusion of the damages theory offered by the  
09:36 18 defendants.

09:37 19 MR. VICKREY: Your Honor --

09:37 20 Q. (By Mr. Vickrey) Dr. Putnam, the judge excluded  
09:37 21 your testimony because it would lead to an incorrect  
09:37 22 assessment of allowable damages, correct?

09:37 23 A. It's true by definition, sure.

09:37 24 Q. All right. Now, let's look at what you said  
09:37 25 yesterday when Red Hat's lawyers questioned you about

09:37 1 it.

09:37 2 And you knew that I was going to ask you  
09:37 3 about this, because last week I took your deposition,  
09:37 4 and I asked you about it, right?

09:37 5 A. That's true.

09:37 6 Q. And so you and Red Hat's lawyers discussed how  
09:37 7 you were going to respond to it yesterday, correct?

09:37 8 A. We certainly did discuss that.

09:37 9 Q. Yeah. And this is what you came up with: I  
09:37 10 worked on a copyright case once where the lawyers  
09:37 11 actually wanted to offer a particular theory of defense,  
09:37 12 and I authored a report for them. So the lawyers wanted  
09:37 13 to put something in front of the Court and the jury and  
09:38 14 you decided that, okay, I'll author it for you, right?

09:38 15 Right?

09:38 16 A. They asked me to write a report and I did, yes.

09:38 17 Q. No, but they said that they wanted to offer a  
09:38 18 particular theory, so that's what you did. That's the  
09:38 19 theory that you offered?

09:38 20 A. It's a question of whether the theory is  
09:38 21 allowable as a matter of law, Mr. Vickrey.

09:38 22 Q. Sir, the lawyers wanted to offer a particular  
09:38 23 theory, so you came up with an expert opinion adopting  
09:38 24 that theory, correct?

09:38 25 A. Under the assumption that the theory was

09:38 1 admissible, yes.

09:38 2 Q. And it wasn't admissible?

09:38 3 A. Yes; that's right.

09:38 4 Q. Now, let's talk about the -- another case. The  
09:38 5 Paragon Trade Brands case. Remember that case, sir?

09:38 6 A. Yes.

09:38 7 Q. And in that case, the federal court in Atlanta  
09:38 8 rejected your opinions after a trial, right?

09:39 9 A. Yes. That was the bankruptcy court actually,  
09:39 10 not the district court but the bankruptcy court.

09:39 11 Q. Well, it's a federal court in Atlanta?

09:39 12 A. Yes, that's right.

09:39 13 Q. It was after the trial, the Court heard your  
09:39 14 testimony, right?

09:39 15 A. Yes.

09:39 16 Q. And the Court rejected your testimony?

09:39 17 A. The bankruptcy court did reject it; that's  
09:39 18 true.

09:39 19 Q. And let's -- and you knew I was going to ask  
09:39 20 you about that, and you talked about that with Red Hat's  
09:39 21 lawyers, right?

09:39 22 A. Of course.

09:39 23 Q. Let's look at what you said yesterday about  
09:39 24 that. Here you're suggesting that the bankruptcy court  
09:39 25 was reversed about the findings she made about your

09:39 1 testimony, right?

09:39 2 A. I'm sure you know as a lawyer, Mr. Vickrey,  
09:40 3 that the case was appealed on the merits, and the  
09:40 4 judgment was reversed on the merits without -- and so  
09:40 5 that rendered the whole opinion about -- the whole trial  
09:40 6 about damages completely moot.

09:40 7 Q. In other words, on the appeal, there was  
09:40 8 nothing said about whether the judge was right or wrong  
09:40 9 about how your testimony was -- let me find a quote --  
09:40 10 contradicted by the evidence and unpersuasive. There  
09:40 11 was nothing in the appeal about that, correct?

09:40 12 A. Yes, of course the Court of Appeal didn't have  
09:40 13 to reach that question.

09:40 14 Q. And now I want to talk about your methodology  
09:40 15 in this case. What you did was to set out, at the  
09:41 16 direction of Red Hat's lawyers, to come up with the  
09:41 17 lowest possible damages in this case, correct?

09:41 18 A. That statement is completely false.

09:41 19 Q. All right. It's your opinion that the damages  
09:41 20 for Red Hat would be \$172,000, right?

09:41 21 A. Yes.

09:41 22 Q. Fair to say that that's less than what your  
09:41 23 firm stands to be paid in this case?

09:41 24 A. I think when all is said and done, my firm will  
09:41 25 probably collect more than 172,000; that's true.

09:41 1 Q. And your hourly rate alone is \$699?

09:41 2 A. 675.

09:41 3 Q. If someone is setting out to come up with the  
09:41 4 lower possible damages, you're going to cherry-pick from  
09:41 5 the evidence, seize on something that helps you, and  
09:41 6 reject or discount everything else, right?

09:41 7 A. Well, the premise is false; the conclusion is  
09:41 8 false, also. I didn't set out to find the lowest  
09:42 9 number, and I didn't cherry-pick.

10 Q. Sir, that's not what I asked you?

09:42 11 THE COURT: I think his answer was fair.  
09:42 12 You may proceed, Mr. Vickrey.

09:42 13 MR. VICKREY: Okay.

09:42 14 Q. (By Mr. Vickrey) Let's look at some of the  
09:42 15 things you actually did in coming up with your opinion  
09:42 16 that this patented feature is trivial.

09:42 17 By the way, those are your words, not  
09:42 18 mine, trivial?

09:42 19 A. We were talking about as a share of the total  
09:42 20 lines of code in the product, and I think that most  
09:42 21 people would agree that 3/1000 of a percent is a trivial  
09:42 22 number.

09:42 23 Q. You and the Defendants' lawyers have shown the  
09:42 24 jury a lot of slides with new statements and opinions  
09:42 25 which can't be found in the two expert reports you

09:42 1 submitted in this case, correct?

09:42 2 A. No, with one exception, and that's the Apple  
09:42 3 agreement. And we put that in, because you asked me  
09:42 4 about it in my deposition.

09:42 5 Q. All right. One of your -- you submitted two  
09:42 6 reports in this case, sir?

09:42 7 A. That's right.

09:42 8 Q. And when was the second report?

09:42 9 A. I don't recall -- I don't recall the date.

09:43 10 Q. April 13?

09:43 11 A. That sounds right, yes.

09:43 12 Q. Okay. Now, one of the first things you  
09:43 13 addressed in direct testimony, you applied something  
09:43 14 called the nine-part test for running royalty, correct?

09:43 15 A. Yes.

09:43 16 MR. VICKREY: Kindly flash that up.

09:43 17 Q. (By Mr. Vickrey) The nine-part test for running  
09:43 18 royalty, that's not found in any of your reports,  
09:43 19 correct?

09:43 20 A. That's false. It should be -- it's in my  
09:43 21 second report.

09:43 22 Q. The nine-part test?

09:43 23 A. Yes.

09:43 24 MR. VICKREY: May I approach, Your Honor?

09:44 25 THE COURT: Yes. Is there.

09:44 1 Q. (By Mr. Vickrey) Dr. Putnam, kindly direct me  
09:44 2 to where I could find the nine-part test.

09:44 3 A. Mr. Vickrey, if you turn to Exhibit 16, which I  
09:44 4 believe is seven pages from the end, this is essentially  
09:44 5 a verbatim copy.

09:44 6 Q. Okay.

09:44 7 THE COURT: Could you hold that up for the  
09:44 8 jury to see?

09:44 9 THE WITNESS: I'm sorry. This is -- you  
09:45 10 can't read it probably, but you can see maybe on the  
09:45 11 right-hand side here all of the -- all the -- no, sir.

09:45 12 MR. VICKREY: I agree with Dr. Putnam that  
09:45 13 it is in Exhibit 16.

09:45 14 Q. (By Mr. Vickrey) But this is something that --  
09:45 15 this test, can you find it in a case or an article or  
09:45 16 anything like that?

09:45 17 A. No. It's not -- I mean -- no, I would say it's  
09:45 18 not derived from a legal test. It's derived from the  
09:45 19 facts in this case and underlying economics.

09:45 20 Q. In other words, this is a test you created for  
09:45 21 this case?

09:45 22 A. It's true I've never applied this test before.  
09:45 23 These -- I've never applied -- collected these nine  
09:45 24 questions into one spot and asked them about -- applied  
09:45 25 them to the facts of a particular case; that's true.

09:45 1 Q. Dr. Putnam, on direct examination, you  
09:45 2 mentioned a license that Red Hat took that covered the  
09:45 3 same products.

09:46 4 A. The accused products, yes.

09:46 5 Q. Including Fedora even though it was a free  
09:46 6 product?

09:46 7 A. I believe -- I believe Fedora is also licensed  
09:46 8 under the license, yes.

09:46 9 Q. And it was for U.S. patents, correct?

09:46 10 A. Yes.

09:46 11 Q. And what was the amount?

09:46 12 A. Around 4 million, I think.

09:46 13 Q. 4.25 million?

09:46 14 A. That sounds right.

09:46 15 Q. You mentioned on direct you had made a  
09:46 16 statement not every copy infringes. You're aware that  
09:46 17 one of the claims in the case is directed to every  
09:46 18 single copy of the software that's distributed?

09:46 19 A. This is a liability question, Mr. Vickrey, and  
09:46 20 my understanding is that a -- in order to infringe, you  
09:46 21 have to have a display and a graphical user interface.  
09:46 22 And my understanding is that's not characteristic of  
09:46 23 every unit.

09:47 24 Q. Are you talking about the units that apply to  
09:47 25 the servers?

09:47 1       A. Well, servers -- in general, not every server,  
09:47 2 but servers in general don't have displays. Of those  
09:47 3 that have displays, not every one has a graphical user  
09:47 4 interface.

09:47 5       Q. Would you agree with me all the Fedora and  
09:47 6 openSUSE products and the RHEL software products and the  
09:47 7 SLED software products are accused of infringement?

09:47 8       A. I think that's a liability question. I  
09:47 9 think --

09:47 10      Q. You don't know?

09:47 11      A. I don't get into liability.

09:47 12      Q. All right. And you sat here through the trial,  
09:47 13 correct?

09:47 14      A. Good parts of it, yes.

09:47 15      Q. And you've heard the testimony that GNOME is  
09:47 16 the default application?

09:47 17      A. For Red Hat, not Novell.

09:47 18      Q. All right. Now, it's your belief, is it not,  
09:48 19 that a reasonable royalty calculation should be adjusted  
09:48 20 to account for the probability that a patent is found  
09:48 21 valid and infringed at trial, correct?

09:48 22      A. You should adjust the licenses that you find,  
09:48 23 if there's evidence that those licenses were negotiated  
09:48 24 over a patent that hasn't been found valid and  
09:48 25 infringed; that's true.

09:48 1 Q. And you make that adjustment routinely, because  
09:48 2 it's the right thing to do and because it's consistent  
09:48 3 with the law, correct?

09:48 4 A. Yes.

09:48 5 Q. Now, according to your report and according to  
09:48 6 your testimony, a good estimate of the parties'  
09:48 7 expectations regarding probability of finding validity  
09:48 8 and infringement is 57 percent?

09:48 9 A. I think I used 58, but yes.

09:48 10 Q. Okay, 58 percent. And the statistical  
09:48 11 foundation for that 58-percent risk percentage was a  
09:48 12 2000 article and a study by Judge Moore, correct?

09:48 13 A. Yes.

09:48 14 Q. And there have been more recent studies and  
09:48 15 articles, correct?

09:49 16 A. Yes.

09:49 17 Q. There was the Sherry and Teece study showing  
09:49 18 that the percentage would actually be 45 percent?

09:49 19 A. They said if you were summarizing the  
09:49 20 literature that they found, they summarized it as 45 to  
09:49 21 55 percent.

09:49 22 Q. All right. So if you took the mid-range,  
09:49 23 that's 50 percent, which results in a two times  
09:49 24 multiplier?

09:49 25 A. Your math is right, yes.

09:49 1 Q. Okay. And that study came out in 2004,  
09:49 2 correct?

09:49 3 A. Yes.

09:49 4 Q. You didn't cite it in your reports?

09:49 5 A. I didn't cite the Sherry and Teece article, no,  
09:49 6 that's right.

09:49 7 Q. And then there was the 2006 study in the AIPLA  
09:49 8 Quarterly Journal, correct?

09:49 9 A. Yes. That's Janake's.

09:49 10 Q. That's the Janake article, and you were aware  
09:49 11 of the article, correct?

09:49 12 A. Yes.

09:49 13 Q. And you didn't cite it in either of your  
09:49 14 reports, correct?

09:49 15 A. I think Professor Janake's numbers are not  
09:49 16 correct. He tried to do the right thing, and ended up  
09:49 17 making a mistake along the way, and I think we need more  
09:50 18 data before we can actually use that method.

09:50 19 Q. But my question was, you didn't cite it in  
09:50 20 either of your reports?

09:50 21 A. I did not cite it for that reason, yes; that's  
09:50 22 right.

09:50 23 Q. That study was peer-reviewed, was it not?

09:50 24 A. I actually don't know.

09:50 25 Q. All right.

09:50 1 MR. VICKREY: May I approach, Your Honor?

09:50 2 THE COURT: Yes.

09:50 3 THE WITNESS: Thank you.

09:50 4 MR. VICKREY: Your Honor may have one  
09:50 5 already, but do you want one?

09:50 6 THE COURT: Go ahead. I've read it.

09:50 7 MR. VICKREY: All right.

09:50 8 Q. (By Mr. Vickrey) Here's the study, correct?

09:51 9 A. This is a copy of the study; that's right.

09:51 10 Q. Yeah. And just looking at the first page, does  
09:51 11 that refresh your recollection that it was, in fact,  
09:51 12 peer-reviewed?

09:51 13 A. I don't mean to dispute with you, Mr. Vickrey.  
09:51 14 I just don't know what evidence you're pointing to.

09:51 15 Q. The footnote.

09:51 16 A. Well, if you mean that they think colleagues  
09:51 17 who made comments on the manuscript, then that's true.  
09:51 18 I interpret peer-reviewed to be a formal process by  
09:51 19 which anonymous referees review the manuscript and pass  
09:51 20 judgment on it. I don't know that that happened.

09:51 21 Q. All right. As far as you know, this is the  
09:51 22 most recent study which sought to quantify litigation on  
09:51 23 uncertainty, correct?

09:51 24 A. No.

09:51 25 Q. Is there another one?

09:51 1       A. Yes. I found one by PricewaterhouseCoopers,  
09:51 2 which is an accounting firm.

09:52 3       Q. And in that PricewaterhouseCoopers study, they  
09:52 4 found that a non-producing entity had a 29-percent rate,  
09:52 5 correct?

09:52 6       A. That was their number for -- I recall that was  
09:52 7 their number, yes.

09:52 8       Q. All right. But the AIPLA study actually  
09:52 9 factored in summary judgment, correct?

09:52 10      A. Yeah. And that was one of the things I thought  
09:52 11 actually Professor Janake deserved credit for trying to  
09:52 12 do, and I wished that he had constructed his sample  
09:52 13 differently. It's an important question.

09:52 14      Q. All right. And the prior study by Judge Moore  
09:52 15 wasn't looking at summary judgment, correct? It was  
09:52 16 just looking at wins at trial, correct?

09:52 17      A. I believe it restricted the sample to cases  
09:52 18 that were disposed of at trial or on appeal; that's  
09:52 19 right.

09:52 20      Q. And one of the reasons why the AIPLA study  
09:52 21 comes to a different percentage is because the win rate  
09:52 22 for defendants in summary judgment is higher, correct?

09:53 23      A. That is one of the reasons, yes.

09:53 24      Q. All right. And you yourself have explained  
09:53 25 that an arm's length royalty agreed to in the course of

09:53 1 licensing negotiation is often insufficient to  
09:53 2 compensate for infringement, correct?

09:53 3 A. Well, if you're referring to the article that I  
09:53 4 published, then the answer is yes, because it doesn't  
09:53 5 take into account the removal of uncertainty. But  
09:53 6 obviously here, that's what I did.

09:53 7 Q. And you also made the comment that -- correct  
09:53 8 me if I'm wrong -- that because of uncertainty, no  
09:53 9 potential licensee would be willing to pay the full  
09:53 10 economic value for the patented technology in the form  
09:53 11 of a royalty, correct?

09:53 12 A. It's a reasonable assumption, sure.

09:54 13 Q. And -- but once the judge or a jury awards  
09:54 14 damages, uncertainty regarding validity and infringement  
09:54 15 have been resolved, right?

09:54 16 A. For the purposes of calculating damages, yes.

09:54 17 Q. All right. Now -- and that's because there's  
09:54 18 actually been a finding by a court as opposed to the  
09:54 19 parties voluntarily agreeing to something in a  
09:54 20 settlement agreement, correct?

09:54 21 A. Yes.

09:54 22 Q. I want to talk a little bit about use, because  
09:54 23 that's a factor in calculating a reasonable royalty,  
09:54 24 correct?

09:54 25 A. Yes.

09:54 1 Q. Did you hear the testimony of Mr. Riveros about  
09:54 2 how Red Hat keeps and archives surveys of their  
09:54 3 customers about the use of features of its software?

09:54 4 A. I wasn't here, but that's consistent with my  
09:55 5 understanding.

09:55 6 MR. VICKREY: Could I please have that?

09:55 7 Q. (By Mr. Vickrey) Did Red Hat produce to you the  
09:55 8 surveys that it keeps?

09:55 9 A. No.

09:55 10 Q. Did you ask for them?

09:55 11 A. My understanding was, these are surveys for our  
09:55 12 new features or features they're testing out. They want  
09:55 13 to see whether to adopt them in their enterprise  
09:55 14 product.

09:55 15 And so since the feature in question has  
09:55 16 already been in the product since 1997, I don't think  
09:55 17 that these features existed at that time -- I'm sorry --  
09:55 18 these surveys existed at that time.

09:55 19 Q. All right. Do you know that for a fact, sir?

09:55 20 A. I don't know it for a fact, no, but I know for  
09:55 21 a fact that Fedora didn't exist at that time.

09:55 22 Q. Well, Mr. Riveros doesn't work on Fedora. He  
09:55 23 works on the enterprise product. He's talking about  
09:56 24 features that Red Hat's customers talk about, not the  
09:56 25 free Fedora software, right?

09:56 1       A. Well, without knowing the context, I'm not  
09:56 2 really sure what these surveys refer to, so I don't want  
09:56 3 to --

09:56 4       Q. All right.

09:56 5       A. I've never seen them, and so I don't want to  
09:56 6 pretend that I know.

09:56 7       Q. All right. You heard Mr. Gemini testify that  
09:56 8 because he didn't have surveys, he looked for evidence  
09:56 9 of what industry analysts and actual users of the  
09:56 10 infringing features said about it, correct?

09:56 11      A. He did say that.

09:56 12      Q. And I just want to briefly touch on some of the  
09:56 13 things that he relied on.

09:56 14                   MR. VICKREY: 285.

09:56 15      Q. (By Mr. Vickrey) The Mozilla article, you've  
09:56 16 seen this, correct, sir?

09:56 17      A. Sure. This is -- the problem is, this is all  
09:57 18 anecdotal evidence; it's one person's opinion. It's not  
09:57 19 actually an industry survey. It's one guy thinks this  
09:57 20 is useful.

09:57 21      Q. I agree with you that this is not a survey, but  
09:57 22 this is one of the things Mr. Gemini found about what  
09:57 23 people in the industry were saying about the feature,  
09:57 24 correct?

09:57 25      A. He did find this, yes.

09:57 1 Q. Kindly turn to 278.

09:57 2 This was the article in PC World  
09:57 3 identifying virtual workspaces as the top feature out of  
09:57 4 20 that Windows ought to have?

09:57 5 A. You only read half of the title. And how to  
09:57 6 get them.

09:57 7 Q. And how to get them.

09:57 8 A. The next page actually tells you how to get  
09:57 9 them for free. We talked about this yesterday. I  
09:57 10 downloaded it from the Microsoft website.

09:57 11 Q. Right. And you're aware Microsoft is licensed  
09:57 12 under these very patents, correct?

09:57 13 A. That's my understanding, yes.

09:57 14 Q. All right. Kindly turn to page -- PX279.

09:58 15 This was another thing that Mr. Gemini --  
09:58 16 another assessment of this feature that Mr. Gemini  
09:58 17 relied on?

09:58 18 A. He did rely on this, yes.

09:58 19 Q. And there were others. I won't go through  
09:58 20 them, but you saw all of them, correct?

09:58 21 A. I think he had one other article that referred  
09:58 22 to it as a secret; that's right.

09:58 23 Q. But none of those are quoted in your reports?

09:58 24 A. Well, because they went -- what we're looking  
09:58 25 for is some sort of quantitative estimate of -- for an

09:58 1 economist, what you care about is what's the economic  
09:58 2 impact of this, and not the fact that some people think  
09:58 3 it's valuable.

09:58 4 Anybody would conceive that some people  
09:58 5 think it's valuable, but you're trying to figure out  
09:58 6 what share of the total is that and how important is it  
09:58 7 to their decision. And nothing Mr. Gemini cited tells  
09:58 8 me about that.

09:58 9 MR. VICKREY: Kindly put up 936, Page 45.  
09:59 10 Highlight that, please.

09:59 11 Q. (By Mr. Vickrey) Here -- this is from your  
09:59 12 second report, correct?

09:59 13 A. Yes.

09:59 14 Q. Here you say that Red Hat determined there  
09:59 15 existed about 9.8 million downloads during the period,  
09:59 16 correct, the damages period?

09:59 17 A. Yes. And the word downloads there, I think, as  
09:59 18 I explained, is meant to be unique IP addresses. But  
09:59 19 with that qualification, yes.

09:59 20 Q. And let's -- and then you also address the RHEL  
09:59 21 product, which is the commercial one?

09:59 22 A. Yes, the enterprise version.

09:59 23 Q. Now, you sat through at least part of the  
09:59 24 trial, and you heard the evidence about IP addresses and  
10:00 25 their accuracy in terms of using them for a barometer of

10:00 1 use, correct?

10:00 2 A. Well, I've heard about their accuracy and the  
10:00 3 count of IP addresses is accurate. I've also heard the  
10:00 4 testimony about how they are used as a barometer and  
10:00 5 that they don't represent users.

10:00 6 So it's important to distinguish between  
10:00 7 those two concepts of accuracy.

10:00 8 Q. That's because -- well, Red Hat has determined  
10:00 9 two things, right? Its IP addresses could result in  
10:00 10 overcounting and actually do, because the number of  
10:00 11 unique IP addresses can be dynamic, so you can count a  
10:00 12 single user multiple times.

10:00 13 A. That's one possible source of error, yes.

10:00 14 Q. But the other error in the methodology that  
10:00 15 overcompensates for that is the fact that for corporate  
10:01 16 and net users, the software can hit a unique IP address  
10:01 17 and then fan out to multiple users, correct?

10:01 18 A. That's another source of error, yes; that's  
10:01 19 true.

10:01 20 Q. But Red Hat said that when you measure those  
10:01 21 two together, the second flaw significantly outweighs  
10:01 22 the first, correct?

10:01 23 A. Well, if you're referring to the Frields  
10:01 24 document, then that's what Mr. Frields said. I think  
10:01 25 the testimony in court from Mr. Tiemann was Mr. Frields

10:01 1 was incorrect.

10:01 2 Q. All right. But -- and you also heard  
10:01 3 Mr. Riveros say for the software they sell -- and they  
10:01 4 have a lot of large companies, corporate companies in  
10:01 5 the United States, correct?

10:01 6 A. They have a range of clients; that's true.

10:01 7 Q. And one of the packages they sell is the  
10:01 8 so-called proxy system?

10:01 9 A. Okay.

10:02 10 Q. And were you here when Mr. Riveros explained  
10:02 11 what would happen if that software hit, for example, my  
10:02 12 law firm? You'd have a single IP address and it would  
10:02 13 fan out to multiple users, and they wouldn't capture the  
10:02 14 IP addresses, correct?

10:02 15 A. I wasn't here for Mr. Riveros' testimony.

10:02 16 Q. I apologize.

10:02 17 THE COURT: Mr. Vickrey, how much longer  
10:02 18 do you think we'll go?

10:02 19 MR. VICKREY: Probably 20 minutes.

10:02 20 THE COURT: Then let's take a break.

10:02 21 MR. VICKREY: Thank you, Your Honor.

10:03 22 (Jury out.)

10:03 23 THE COURT: Would the attorneys  
10:03 24 coordinating the lunch speak to Peggy? Jan can make  
10:03 25 that connection, if you'd like.

10:03 1 (Recess.)  
10:03 2 (Jury out.)  
10:14 3 THE COURT: Gentlemen, I'm a little  
10:14 4 worried about time here. It's not my job to tell you  
10:14 5 how to do your question, but it's my judgment the jury  
10:14 6 has heard of a lot of these things five and six times.  
10:14 7 Let's see if we can focus on trying to finish rather  
10:14 8 than trying to get in the last punch, all right?

10:14 9 MR. VICKREY: Yes, Your Honor.

10:14 10 MR. REITER: Yes, Your Honor.

10:14 11 THE COURT: Okay. Bring in the jury.

10:16 12 (Jury in.)

10:16 13 THE COURT: Please be seated.

10:16 14 Dr. Putnam, you remain under oath.

10:16 15 THE WITNESS: Yes, Your Honor.

10:16 16 THE COURT: Mr. Vickrey, you were  
10:16 17 inquiring.

10:16 18 MR. VICKREY: Yes.

10:16 19 CROSS-EXAMINATION

10:16 20 BY MR. VICKREY:

10:16 21 Q. Dr. Putnam, I'm going to move this along as  
10:16 22 quickly as possible. Kindly turn back to the PX936,  
10:16 23 Page 45.

10:16 24 I want to turn briefly to Novell. The 1.8  
10:16 25 million, would you agree with me that the 1.8 million

10:16 1 doesn't even take into account the -- the enterprise  
10:16 2 users, in other words, the users of the commercial  
10:16 3 product that Novell makes money off of in the U.S.?

10:16 4 A. That's my understanding.

10:16 5 Q. And would you agree with me that Novell's  
10:16 6 revenue, since you've looked at the annual reports, is  
10:16 7 roughly 50 -- 50 percent derived from U.S. sales?

10:17 8 A. For what products?

10:17 9 Q. For all of its products.

10:17 10 A. You mean as a company?

10:17 11 Q. Yes.

10:17 12 A. That would be surprising.

10:17 13 Q. All right.

10:17 14 MR. VICKREY: Tristan, kindly turn to  
10:17 15 Exhibit 17 from the -- of the same report.

10:17 16 Q. (By Mr. Vickrey) Now, here's -- here we have  
10:17 17 the culmination of your analysis of the lic -- license  
10:17 18 agreements, correct?

10:17 19 A. Well, I wouldn't call it the culmination. It's  
10:17 20 actually a comparison of the agreements of  
10:17 21 Mr. Gemini's opinions, but okay.

10:17 22 Q. But, I mean, these are agreements that not just  
10:17 23 Gemini analyzed, you analyzed them, as well, correct?

10:17 24 A. Yes.

10:17 25 Q. And that's because these agreements are

10:18 1 something important to look to in determining a  
10:18 2 reasonable royalty, correct?

10:18 3 A. One should look at licenses to the  
10:18 4 patents-in-suit, yes.

10:18 5 Q. All right. Let's -- let's just focus on HP.  
10:18 6 Here you called this license a fixed license, correct?

10:18 7 A. Yes.

10:18 8 Q. In other words, lump sum?

10:18 9 A. That's right.

10:18 10 Q. And even though there is a running royalty  
10:18 11 component in the license, you've taken that off the  
10:18 12 table, right?

10:18 13 A. There's a contingency that evidently was never  
10:18 14 fulfilled, that's true.

10:18 15 Q. You don't know one way or the other because we  
10:18 16 have no sales information, correct?

10:18 17 A. I have no information -- I have not seen any  
10:18 18 information that anybody paid under that contingency.

10:18 19 Q. But just so we're all clear, there's -- there's  
10:18 20 actually a written -- something written in the license  
10:18 21 agreement that calls out a one percent running royalty,  
10:18 22 right?

10:18 23 A. The word one percent does appear in the license  
10:18 24 agreement, that's true.

10:18 25 Q. And you understand that to be a running

10:19 1 royalty?

10:19 2 A. A contingent running royalty, yes, that's  
10:19 3 right.

10:19 4 Q. All right. But let's take your assumption that  
10:19 5 it's just \$110,000 lump sum payment to HP.

10:19 6 A. Okay.

10:19 7 Q. Because that's what you're saying here,  
10:19 8 correct?

10:19 9 A. Yes.

10:19 10 Q. We know, do we not, from a later press release  
10:19 11 from Borland that there was an estimate of 125,000 units  
10:19 12 sold by HP?

10:19 13 A. Yes.

10:19 14 Q. And if we calculate -- if we apply the 110,000  
10:19 15 to the 125,000 units, you get 88 -- 88 cents per unit  
10:19 16 royalty?

10:19 17 A. I haven't done the math, but that sounds right.

10:19 18 Q. Okay. Now, let's take a look at the two lump  
10:19 19 sum -- no -- Silicon Graphics and Apple, if we could  
10:20 20 focus on those two, because these are the really meat  
10:20 21 and potatoes of your analysis of the lump -- what you  
10:20 22 consider to be the appropriate lump sum, correct?

10:20 23 A. Well, they're operating system licenses, and so  
10:20 24 they're more comparable than the add-on utility licenses  
10:20 25 for the reasons I've already said.

10:20 1 Q. All right. I'm going to address what you have  
10:20 2 for sales down here in a minute and the accuracy of  
10:20 3 that. But let's just assume that this is true. We're  
10:20 4 looking at -- forgive the pun, but an apples-to-apples  
10:20 5 comparison, correct?

10:20 6 A. I'm sorry. What are we comparing?

10:20 7 Q. Well, if we compare the SGI license to the  
10:20 8 Apple license, you're considering both sales to be  
10:20 9 equal, billion apiece, and they're both operating  
10:20 10 systems, and they're both lump sum, right?

10:20 11 A. Well, they're both operating system, they're  
10:20 12 both lump sum, and we did some back-of-the-envelope  
10:21 13 calculation to try to figure out what portion of the  
10:21 14 total sales of Silicon Graphics and Apple, which sell  
10:21 15 hardware as well as software, what portion of those  
10:21 16 sales was attributable to an operating system. And, you  
10:21 17 know, back-of-the-envelope, a billion dollars is, you  
10:21 18 know, as good a guess as any.

10:21 19 Q. But you've identified five characteristics,  
10:21 20 five different characteristics for these licenses,  
10:21 21 correct?

10:21 22 A. Yes.

10:21 23 Q. And four of the five are precisely identical  
10:21 24 for SGI and Apple, correct, four of the five?

10:21 25 A. Well, if you accept the calculation of software

10:21 1 sales. And so with that qualification, sure.

10:21 2 Q. The difference is in what was paid for them,  
10:21 3 correct?

10:21 4 A. Yes.

10:21 5 Q. And would you agree with me that \$96,000 -- or,  
10:21 6 I'm sorry, 1.2 million -- it's not really 1.2 million,  
10:21 7 it's actually 1.25 million, right?

10:22 8 A. I think we adjusted for present value in that  
10:22 9 calculation. It is 1.25 million, yes, that's right.

10:22 10 Q. Would you agree with me that 1.25 million is  
10:22 11 roughly 13 times \$96,000?

10:22 12 A. I think your math is right.

10:22 13 Q. So even though you've testified that software  
10:22 14 prices went down over time, correct?

10:22 15 A. Yes.

10:22 16 Q. At least in this instance, Apple was valuing  
10:22 17 the technology much greater than SGI?

10:22 18 A. Well, you know, it's-- I don't know how much  
10:22 19 you want to get into this. Remember all of Apple's  
10:22 20 products were licensed, so not just their computers, but  
10:22 21 also their iPhones and iPods and any -- anything that  
10:22 22 uses their operating system.

10:22 23 And so if you were trying to do a, quote,  
10:22 24 unquote, apples-to-apples comparison, you'd have to  
10:23 25 adjust for that in the Silicon Graphics license, and I

10:23 1 can't think of any good way to do that.

10:23 2 Q. You're not telling this jury that these patents  
10:23 3 apply to all of Apple's products, correct?

10:23 4 A. I -- my understanding is that's -- that  
10:23 5 language is taken directly from the Apple license  
10:23 6 agreement.

10:23 7 Q. But do you have any understanding that the iPod  
10:23 8 or iPad would have infringed these patents?

10:23 9 A. My understanding as an economist, we'll take it  
10:23 10 for what it's worth, is that the iPad and the iPhone and  
10:23 11 the iPod all run scaled-down versions of a Macintosh  
10:23 12 operating system, and so they very well could have  
10:23 13 multiple workspaces if you wanted them to.

10:23 14 Q. Okay. You understand that -- that my clients  
10:23 15 sued Apple over the Tiger Operating System, correct?

10:23 16 A. Well, I think that they gave the Tiger  
10:24 17 Operating System as an example of infringement, yes.

10:24 18 Q. That's -- that's the operating system that they  
10:24 19 identified in the complaint that was filed, correct?

10:24 20 A. I think that's right, yes.

10:24 21 Q. All right. And then the Tiger Operating System  
10:24 22 was supplanted and replaced by the Leopard Operating  
10:24 23 System, correct?

10:24 24 A. That's also my understanding, yes.

10:24 25 Q. Now, here you've assumed a billion in sales for

10:24 1 SGI?

10:24 2 A. As I recall, the only information we had was  
10:24 3 there was 23 billion dollars in sales of systems, and so  
10:24 4 for the purposes of trying to get a number, we said,  
10:24 5 well, let's assume that 5 percent of those sales are  
10:24 6 attributable to the operating system, but that was an  
10:24 7 assumption, not based on anything, so --

10:24 8 Q. In fact, you mention in your report that you  
10:24 9 couldn't find any sales information for the SGI product,  
10:25 10 correct?

10:25 11 A. Other than the aggregate level of sales, which  
10:25 12 was 23 billion, that's right.

10:25 13 Q. Which -- which didn't specifically address the  
10:25 14 product being licensed, correct?

10:25 15 A. It incorporated the product being licensed,  
10:25 16 which is the operating system, but other than that, yes.

10:25 17 Q. Just so we're clear, you didn't have any  
10:25 18 information to measure the sales of the product that was  
10:25 19 being licensed, correct?

10:25 20 A. That's true.

10:25 21 Q. And that's one of the things -- the expected  
10:25 22 demand that somebody would look at in a lump -- in  
10:25 23 negotiating a lump sum payment, correct?

10:25 24 A. As a matter of principle, sure.

10:25 25 Q. But you didn't have that and -- and neither do

10:25 1 we, correct?

10:25 2 A. Yes.

10:25 3 Q. But we did have indications in the record that  
10:25 4 SGI was prepared to dismantle, disable, or otherwise not  
10:25 5 use the feature?

10:25 6 A. They indicated that they were prepared to do  
10:25 7 that, that's true.

10:25 8 Q. And one of the things that you've -- that  
10:25 9 you've cited in the past is the Sherry and Teece study?

10:26 10 A. You mean in other expert reports or other  
10:26 11 cases?

10:26 12 Q. Or didn't you mention in this case, 45 to 5  
10:26 13 percent range?

10:26 14 A. Yeah, I think we established that I didn't cite  
10:26 15 it in this case.

10:26 16 Q. Okay.

10:26 17 A. I'm aware of it.

10:26 18 Q. And one of the things that they identified was  
10:26 19 in some instances, the value of an invention just  
10:26 20 because of other circumstances actually can increase  
10:26 21 over time, correct?

10:26 22 A. That can happen.

10:26 23 Q. And you're not ruling that out in this case,  
10:26 24 are you?

10:26 25 A. I actually am ruling it out in this case.

10:26 1 Q. Just one more thing on HP. I think you said on  
10:26 2 direct examination that the day they got the product,  
10:26 3 they wanted to decrease the price?

10:26 4 A. Yes.

10:26 5 Q. Is there any evidence that -- that Xerox was  
10:26 6 aware of any intention to decrease the price of the \$99  
10:27 7 unit?

10:27 8 A. Xerox knew that HP was selling the business to  
10:27 9 Borland. So they knew Borland was a -- going to be the  
10:27 10 person actually operating under the license, and I don't  
10:27 11 know -- I don't know what Xerox knew about Borland's  
10:27 12 marketing plans at the time of that negotiation.

10:27 13 Q. All right. I want to go to HP real quick.  
10:27 14 Here you said the rate is not applicable, correct?

10:27 15 A. Because there is no -- there is no rate, that's  
10:27 16 right, yes.

10:27 17 Q. And you've ridiculed Mr. Gemini in the past  
10:27 18 about using a 99 percent -- 99 cent per unit rate,  
10:27 19 correct?

10:27 20 A. I object to the characterization. I wouldn't  
10:27 21 say I ridiculed him. I said it was factually incorrect.

10:27 22 Q. Wait. I think you told me in your deposition  
10:28 23 you ridiculed him.

10:28 24 MR. VICKREY: Kindly turn to 997, I think  
10:28 25 schedule 10. Let's focus on Hewlett Packard, please.

10:28 1 Q. (By Mr. Vickrey) This is your report, please?

10:28 2 A. Yes.

10:28 3 Q. And kindly --

10:28 4 MR. VICKREY: Put the whole thing up.

10:28 5 Q. (By Mr. Vickrey) We -- we have different  
10:28 6 columns. One is what you've called the observed  
10:28 7 royalty?

10:28 8 A. Yes.

10:28 9 Q. And tell us what you've used as your observed  
10:28 10 royalty for the HP license?

10:28 11 A. Well, we -- we calculated using Mr. Gemini's  
10:28 12 method one percent of \$99, and if you do the math, then  
10:28 13 that's 99 cents.

10:28 14 Q. Well, that's not what you said in your report.  
10:28 15 You didn't say this is Mr. Gemini's analysis. This is  
10:28 16 your analysis, correct?

10:28 17 A. Well, but this is an analysis based on the  
10:28 18 percentage of revenue which at the time was  
10:28 19 Mr. Gemini's theory. It no longer is. So I was trying  
10:28 20 to conform my criticism of Mr. Gemini to what he  
10:28 21 actually said.

10:29 22 Q. All right. I want to wrap this up. I think I  
10:29 23 heard you testify yesterday, and I'm sorry to do this,  
10:29 24 but I think you said the Apple license reached back six  
10:29 25 years, something like that?

10:29 1 A. That's my understanding of the way it was --  
10:29 2 the Plaintiffs -- these Plaintiffs pled that case.

10:29 3 Q. All right. But you're not a lawyer, correct?

10:29 4 A. That's certainly true.

10:29 5 Q. But, nonetheless, you try to keep up with the  
10:29 6 case law in patent infringement -- in the patent  
10:29 7 infringement arena, correct?

10:29 8 A. As much as an economist can. I rely on lawyers  
10:29 9 for legal advice.

10:29 10 Q. All right. You're aware my clients sued Apple  
10:29 11 on the '412 patent on a method claim?

10:29 12 A. Yes.

10:29 13 Q. And are you aware of any court opinions or  
10:30 14 statutes that would have allowed IPI to obtain past  
10:30 15 damages on a method claim on Apple sales prior to  
10:30 16 receiving notice of the patent?

10:30 17 A. My understanding is that when you plead a  
10:30 18 method claim, you can go back six years for damages.  
10:30 19 That's my understanding.

10:30 20 Q. Well, I'm talking about two different things.  
10:30 21 I'm -- I'm distinguishing Apple's internal use from  
10:30 22 Apple's sales to third parties. Let's take the latter  
10:30 23 situation.

10:30 24 Are you -- can you tell us any court  
10:30 25 opinion or statute that would have allowed my clients to

10:30 1 reach back six years for damages against Apple on sales  
10:30 2 on a method claim?

10:30 3 A. Well, Mr. Vickrey, for the purposes of  
10:30 4 this -- this case, I think I would say that's the advice  
10:30 5 I've been given, and that's the interpretation of the  
10:30 6 law. So I'm not going to cite case law to you because I  
10:31 7 think it would be improper.

10:31 8 Q. Well -- I'll move on.

10:31 9 You heard evidence as to the how --  
10:31 10 talking about Apple again. You heard evidence as to how  
10:31 11 the system that IPI sued on, the Tiger system required  
10:31 12 separate users to log in and log off before they could  
10:31 13 switch, correct?

10:31 14 A. I did hear that discussion, yes, uh-huh.

10:31 15 Q. And have you -- and have you heard any evidence  
10:31 16 or any testimony from the Defendants' experts that the  
10:31 17 Tiger method would infringe any of the patents-in-suit?

10:31 18 A. My understanding from the complaint was that it  
10:31 19 did -- they did specifically accuse instances in which  
10:31 20 there were multiple users, but, obviously, this is  
10:32 21 beyond both my legal expertise and my technical  
10:32 22 expertise. But my -- my understanding was that they  
10:32 23 contemplated the multiple user log-in scenario.

10:32 24 Q. Okay. My question was something a little  
10:32 25 different.

10:32 1 Did you hear any testimony from the  
10:32 2 Defendants' experts that the Tiger method would infringe  
10:32 3 any of the patents-in-suit?

10:32 4 A. Well, the Defendants' experts are -- were hired  
10:32 5 to analyze the Red Hat and Novell systems, and so I  
10:32 6 don't -- I don't recall any testimony about the Apple  
10:32 7 operating system.

10:32 8 Q. But, now, if the patents just covered Leopard,  
10:32 9 assume with me just that fact, we're talking roughly 4  
10:32 10 million units sold in the U.S., correct?

10:32 11 A. If you're talking -- I don't have the numbers  
10:32 12 off the top of my head.

10:32 13 MR. VICKREY: Kindly flash up PX316. Next  
10:33 14 page. Yeah, highlight the Mac sales, U.S.

10:33 15 Q. (By Mr. Vickrey) This is Apple's annual  
10:33 16 report, and this shows, does it not, for 2008 that the  
10:33 17 total sales were less than 4 million units?

10:33 18 A. For -- for the Americas, that's true, but it's  
10:33 19 a worldwide license.

10:33 20 Q. Right. But these -- these were the same  
10:33 21 patents, the same U.S. patents, correct, that we're  
10:33 22 talking about, the Apple license?

10:33 23 A. The Apple license is a worldwide license under  
10:33 24 the U.S. patents, that's true.

10:33 25 Q. For the same patents-in-suit in this case, same

10:33 1 U.S. patents?

10:33 2 A. The Apple license covers the same  
10:33 3 patents-in-suit in this case, yes, that's right.

10:33 4 Q. All right. You also heard testimony that Apple  
10:33 5 threatened to delay the release of the Leopard system  
10:34 6 until after the patents expired, correct?

10:34 7 A. I think that actually mischaracterizes the  
10:34 8 testimony. I think that was at most what Mr. Cooper  
10:34 9 said that an Apple lawyer told him that Apple might have  
10:34 10 been thinking. But --

10:34 11 Q. But you heard Mr. Riveros testify that -- that  
10:34 12 it would have been difficult for Red Hat to remove this  
10:34 13 feature from its products?

10:34 14 A. I actually wasn't here, as I said, for Mr.  
10:34 15 Riveros' testimony.

10:34 16 MR. VICKREY: That's all I have, sir.  
10:34 17 Thank you.

10:34 18 THE COURT : Thank you, Mr. Vickrey.

10:34 19 Mr. Reiter?

10:34 20 MR. REITER: I will try and be very brief,  
10:34 21 Your Honor.

10:34 22 THE COURT: Thank you.

10:34 23 REDIRECT EXAMINATION

10:34 24 BY MR. REITER:

10:34 25 Q. Just very quickly, Dr. Putnam. I wanted to

10:34 1 review the SGI license and the Apple license.

10:35 2 MR. REITER: If, Mr. Barns, you could put  
10:35 3 up DX773, please, and go to Article 1.1 on the second  
10:35 4 page. 1.1, please. Oh, I need to switch.

10:35 5 COURT ROOM DEPUTY: You need to switch.

10:35 6 MR. REITER: Okay. Thank you.

10:35 7 Q. (By Mr. Reiter) What is the licensed product  
10:35 8 here under the SGI license?

10:35 9 A. The licensed product is the desks and desk  
10:35 10 overview application which is their -- I understand is  
10:35 11 their -- component of that graphical user interface  
10:35 12 within the IRIX operating system, which is what SGI  
10:35 13 called its operating system.

10:35 14 Q. Does that license that SGI provi -- or received  
10:35 15 cover all of their products?

10:35 16 A. Yes.

10:35 17 Q. All products at SGI are covered by this  
10:35 18 license?

10:35 19 A. Well, in other words, anything that -- anything  
10:36 20 that incorporates the desks and desk overview  
10:36 21 application within the operating system, yes.

10:36 22 Q. Okay.

10:36 23 MR. REITER: If we can turn to DX740,  
10:36 24 please, and also put up Section 1.1, licensed product.

10:36 25 Q. (By Mr. Reiter) This is from the Apple

10:36 1 agreement. And what does this cover in contrast to the  
10:36 2 SGI license?

10:36 3 A. Well, this is obviously broader. It means any  
10:36 4 product, service, devices, system, hardware, software,  
10:36 5 or offering made, used, sold, offered for sale, leased,  
10:36 6 purchased, licensed or imported by or for Apple or an  
10:36 7 Apple affiliate.

10:36 8 Q. So how do the SGI and Apple license grants  
10:36 9 compare?

10:36 10 A. Well, this -- this covers the entire operating  
10:36 11 system and hardware and software. The SGI license  
10:36 12 covered the, it says, the desks and desk overview  
10:36 13 application within the operating system, and so this is  
10:36 14 going to -- the grant -- I think what's being granted  
10:36 15 here is much broader.

10:37 16 Q. Now, I want to turn briefly to the HP license.  
10:37 17 Recall Mr. Vickrey asked you some questions about the  
10:37 18 \$110,000 applied to 125,000 units?

10:37 19 A. Yes.

10:37 20 Q. And tried to come up with some kind of a rate  
10:37 21 for that?

10:37 22 A. Yes.

10:37 23 Q. Is there something missing in that calculation?

10:37 24 A. Yes.

10:37 25 Q. What's missing?

10:37 1 A. Well, as you recall from the HP license,  
10:37 2 there's -- remember, what's happening at the HP license  
10:37 3 is that there's sales going backwards and there's sales  
10:37 4 going forwards, because we're -- HP is transferring the  
10:37 5 business to Dashboard. So this is you're cleaning out  
10:37 6 your house and you're trying to get your house in order,  
10:37 7 and so you're paying for the sales that you made in the  
10:37 8 past, and you're paying for the sales that Borland is  
10:37 9 going to make going forward.

10:37 10 Mr. Vickrey applied the \$110,000 payment  
10:37 11 only to the sales going past but didn't apply it to the  
10:37 12 sales going forward. If you were going to compute the  
10:37 13 rate effectively, you would say this \$110,000 payment  
10:37 14 needs to apply both to HP sales that it's already made  
10:37 15 and to all the sales, at least up to 10 million, that  
10:38 16 Borland is going to make in the future.

10:38 17 So you can't just take \$110,000 and divide  
10:38 18 it by the 125,000 units because you're forgetting about  
10:38 19 the future. That's not what the license says.

10:38 20 Q. Another subject, we've all heard about it a  
10:38 21 lot, and I'm not -- I'm just going to have one or two  
10:38 22 questions.

10:38 23 IP addresses. In the hypothetical  
10:38 24 negotiations, would the parties here in your opinion  
10:38 25 have used that as a way of counting rev -- or counting

10:38 1 the base?

10:38 2 A. No.

10:38 3 Q. Why not?

10:38 4 A. Well, so first of all, we can't find any  
10:38 5 licenses where they actually do do that. And so I'm an  
10:38 6 economist. I look at what people do. And the common  
10:38 7 sense thing is to see if people actually use IP  
10:38 8 addresses to negotiate licenses. Nobody does that.

10:38 9 If you can't find a license where people  
10:38 10 actually do this, it doesn't make any sense to propose a  
10:38 11 license and say the parties would have agreed to it  
10:38 12 based on IP addresses.

10:38 13 And then for all the reasons I'm sure  
10:38 14 we're now -- will be relieved not to hear from anymore,  
10:38 15 IP addresses don't correspond to users. And so, you  
10:39 16 know, Albert Einstein said that not everything that  
10:39 17 counts can be counted and not everything that can be  
10:39 18 counted counts. Okay. Just because you can find a  
10:39 19 number doesn't mean it means anything. IP addresses  
10:39 20 have nothing to do with how many people actually use the  
10:39 21 Plaintiffs' product.

22 Q. Next subject. Mr. Vickrey showed you something  
10:39 23 he called anecdotal evidence. We've been using that.  
10:39 24 What does that mean, anecdotal evidence?

10:39 25 A. That's a -- that's a \$5 word for a five cent

10:39 1 concept. It just means that it's stories. If I tell  
10:39 2 you an anecdote, it means that I went over to the Ford  
10:39 3 dealer yesterday and tried to buy a part for my car.

10:39 4 That's a story. It doesn't tell you  
10:39 5 anything about how many parts Ford sells or how many  
10:39 6 Ford dealers there are in the country. It doesn't tell  
10:39 7 you any systematic information. It's just a story about  
10:39 8 me.

10:39 9 And Mr. Gemini told stories about how  
10:39 10 people had used this feature and how it was important to  
10:39 11 them.

10:39 12 Q. Well, I just want to clarify -- strike that.

10:39 13 Have you seen anything from Red Hat or  
10:39 14 Novell that talks about people using this feature or  
10:40 15 this product or demand for this product?

10:40 16 A. No.

10:40 17 Q. This feature? So the only thing we've seen is  
10:40 18 this anecdotal evidence; is that right?

10:40 19 A. Yes, there was something from Ubuntu, which is  
10:40 20 a competitor, actually, and a couple blogs or -- or  
10:40 21 reviews.

10:40 22 Q. Now the next subject, the Janake article, you  
10:40 23 talked about that a little bit this morning with me and  
10:40 24 also with Mr. Vickrey, recall that?

10:40 25 A. Yes.

10:40 1 Q. You said you didn't use it, and you had an  
10:40 2 explanation, and I just want to make sure that we all  
10:40 3 understand. Why do you think that it is not the best  
10:40 4 article to use?

10:40 5 A. Professor Janake picked a certain sample of  
10:40 6 cases to analyze. He picked the cases that go up to  
10:40 7 Washington to -- on appeal where Judge Rader's court  
10:40 8 actually is. And those cases are not a random sample of  
10:40 9 the entire population. They're a particular set of  
10:41 10 cases.

10:41 11 It's sort of like the car example. The  
10:41 12 cars that you see in the shop at the dealer are not a  
10:41 13 random sample of all the cars on the road; they're the  
10:41 14 ones that need fixing. And so it's in the same -- it's  
10:41 15 sort of the same thing, when cases go up on appeal to  
10:41 16 Judge Rader's court, they're the ones that need fixing.

10:41 17 And so you can't draw an inference from  
10:41 18 that sub-sample of cases about all the cases as a whole.  
10:41 19 And so you wouldn't use that as the basis for trying to  
10:41 20 figure out how much the license should be discounted in  
10:41 21 a negotiation, because in the real world, parties  
10:41 22 wouldn't use -- wouldn't do what Mr. Janake did to try  
10:41 23 to figure out the odds of winning at trial. It's not  
10:41 24 the right way to think about it.

10:41 25 Q. Let me be clear, though, but in your analysis,

10:41 1 you did account for this risk, did you not?

10:41 2 A. I just used a different number because

10:41 3 Mr. Janake's number -- he tried to do the right thing,

10:41 4 he just didn't get it right.

10:41 5 Q. Okay. But you -- you acted for it?

10:41 6 A. I did, yes.

10:41 7 Q. Okay. Last thing.

10:41 8 MR. REITER: I want to put up DX936,

10:42 9 Exhibit 16 please. I don't think everybody was able to

10:42 10 see that.

10:42 11 Q. (By Mr. Reiter) And this is a chart from your  
10:42 12 expert report; is that right?

10:42 13 A. Yes.

10:42 14 Q. So what -- what was this?

10:42 15 A. Well, now, I've seen this three or four times.  
10:42 16 This is just -- so in -- the way this works is I have to  
10:42 17 tell everybody what my opinions are going to be before I  
10:42 18 come to court. And so I have to give a report.

10:42 19 And one of my opinions is the nine-part  
10:42 20 test for why it is you wouldn't pick a running royalty.  
10:42 21 And so I put this exhibit into my report, and I copied  
10:42 22 it to show to the jury, and it's basic -- it's  
10:42 23 essentially identical. I can't see any differences.

10:42 24 Q. Now, in creating this -- this chart and the  
10:42 25 factors in the chart, did you use things such as the

10:42 1 Georgia-Pacific factors and your training as an  
10:42 2 economist to determine what was appropriate?

10:42 3 A. Of course.

10:42 4 Q. You didn't just pick them out of the air, did  
10:43 5 you?

10:43 6 A. Well, no. So, for example, we talked about the  
10:43 7 incidence of use, and so that's Factor 11 under  
10:43 8 Georgia-Pacific.

10:43 9 And the question is, did each unit  
10:43 10 generate revenue? And that's one of the factors under  
10:43 11 Georgia-Pacific. How do you -- does the sale of the  
10:43 12 product allow you to make money by selling other  
10:43 13 products.

10:43 14 And, you know, what I call the input  
10:43 15 market and the output market, just what do competitors  
10:43 16 pay for this in this market? So it's all completely  
10:43 17 within Georgia-Pacific.

10:43 18 MR. REITER: I have no further questions.

10:43 19 THE COURT: Thank you, Mr. Reiter.

10:43 20 Mr. Vickrey?

10:43 21 MR. VICKREY: Nothing further, Your Honor.

10:43 22 THE COURT: Thank you.

10:43 23 Thank you, Dr. Putnam, you may step down.

10:43 24 THE WITNESS: Thank you, Your Honor.

10:43 25 THE COURT: Mr. Reiter?

10:43 1 MR. REITER: At this point, Your Honor, we  
10:43 2 -- the Defendants rest.

10:43 3 MR. HILL: Your Honor, at this time, the  
10:43 4 Plaintiffs close.

10:43 5 THE COURT: Then thank you, gentlemen.  
10:43 6 We've come to the close of the presentation of evidence,  
10:44 7 ladies and gentlemen. We will now proceed to the next  
10:44 8 and important part of this case, the instructions.

10:44 9 Mr. Gasey, do you have some comments  
10:44 10 before that?

10:44 11 MR. GASEY: Your Honor, just to save time  
10:44 12 for the jury, I'm assuming that we have the same  
10:44 13 arrangement to preserve our Rule 50 motion, so we --

10:44 14 THE COURT: Absolutely. Excuse me.

10:44 15 MR. HILL: Would you like to do that here,  
10:44 16 Your Honor, or at the sidebar?

10:44 17 THE COURT: Yeah, come up to the sidebar.  
10:44 18 We can do that very quickly here.

10:44 19 (Bench conference.)

10:44 20 MR. GASEY: Sorry, Your Honor.

10:44 21 THE COURT: No, no, no, I was the one that  
10:44 22 was trying to rush along.

10:44 23 Mr. Gasey?

10:44 24 MR. GASEY: Yes, Your Honor, we'd like to,  
10:44 25 if it's agreeable with the Defendants, make our JMOL

10:44 1 record on paper but have the Defendants agree that we  
10:44 2 would have our rights preserved as if they were timely  
10:44 3 made in Court at this time.

10:44 4 MR. REITER: Okay. And we will be  
10:45 5 renewing our JMOL, as well, not that we've been fully  
10:45 6 heard, and --

10:45 7 THE COURT: That will be fine.

10:45 8 MR. REITER: Okay.

10:45 9 THE COURT: And we will acknowledge all of  
10:45 10 this as happening in open court.

10:45 11 MR. REITER: Okay. Then everything is  
10:45 12 preserved.

10:45 13 THE COURT: And then you can do it all in  
10:45 14 paper to preserve every last word.

15 MR. REITER: Okay. Thank you, Your Honor.

16 MR. GASEY: Thank you.

17 THE COURT: Now I'll go right into an  
18 instruction.

19 MR. GASEY: Okay.

10:45 20 (Bench conference concluded.)

10:45 21 THE COURT: Mr. Gasey, Mr. Reiter, as the  
10:45 22 Court goes through its instructions. I was thinking I  
10:45 23 might put them on the screen. Is that --

10:45 24 MR. GASEY: That's fine, Your Honor.

10:45 25 MR. REITER: Yeah.

10:45 1 THE COURT: Does that work for you?

10:45 2 MR. REITER: Yes, Your Honor.

10:45 3 THE COURT: It sometimes helps to -- this  
10:46 4 is a little dangerous. You're going to see where I'm  
10:46 5 ad-libbing because you'll see what is written down as  
10:46 6 instructions.

10:46 7 Ladies and gentlemen, just to make sure  
10:46 8 you understand what we're going to do, I will now give  
10:46 9 you your instructions on the law. They will reference  
10:46 10 the verdict form which you will have when you go into  
10:46 11 the deliberation room, and they will reference also the  
10:46 12 claim construction defining the terms of the claim.

10:46 13 Following that, each of the parties has  
10:47 14 about an hour to argue to you the -- their view of how  
10:47 15 the case should be decided. Let's go through my jury  
10:47 16 instructions, and then let's talk about the timing. The  
10:47 17 parties have jointly agreed to provide you with a lunch,  
10:47 18 and that's being brought in in a timely fashion. What  
10:47 19 we'll decide together is when to have that lunch, and --  
10:47 20 but let's first dispose of the -- this important part of  
10:47 21 the law.

10:47 22 The reason we're slowing down just a  
10:48 23 little is I realized the copy you have up there is not  
10:48 24 the final copy. You're hurting my feelings. I think I  
10:48 25 have a very profound voice. She's making me use the

10:48 1 microphone.

10:49 2 Members of the jury, I will now provide  
10:49 3 you with the final instructions on the law. As you're  
10:49 4 aware from the presentation of evidence, we must address  
10:50 5 several -- several areas of the law. I will identify  
10:50 6 each issue, the parties' contentions as to that issue  
10:50 7 and the particular questions you will answer during your  
10:50 8 deliberations and the law you must follow. You will  
10:50 9 have a copy of these final instructions for your  
10:50 10 reference here to follow along. I ask you to read  
10:50 11 along.

10:50 12 Please listen carefully to everything I'm  
10:50 13 telling you now. You'll be provided with copies of a  
10:50 14 verdict form. You must answer each and every one of the  
10:50 15 questions on the verdict form unless it instructs you to  
10:50 16 skip a question. Your foreperson must sign and date the  
10:50 17 form.

10:50 18 Now let's talk about your duties first.  
10:50 19 You have two main duties as a juror. First, you must  
10:50 20 decide what the facts are from the evidence you saw and  
10:51 21 heard here in Court. Second, you must take the law that  
10:51 22 I give you, apply it to the facts, and answer the  
10:51 23 questions in the verdict form.

10:51 24 It's my job to instruct you about the law.  
10:51 25 You are bound by the oath that you took at the beginning

10:51 1 of the trial to follow those instructions. My  
10:51 2 instructions include an instruction on the meaning of  
10:51 3 the patent claims. You'll take that with you into the  
10:51 4 room.

10:51 5 Let me start by defining evidence. We  
10:51 6 talked about this a bit, but you must make your decision  
10:51 7 based only on evidence you saw and heard here in court.  
10:51 8 The evidence in this case includes only what the  
10:51 9 witnesses said while they were testifying under oath,  
10:51 10 the exhibits admitted into evidence, and the  
10:51 11 stipulations that the lawyers may have agreed to, and  
10:51 12 the facts I will instruct you to take as true.

10:51 13 Nothing else is evidence. The lawyers'  
10:51 14 arguments, questions, objections, and statements are not  
10:51 15 evidence. My legal rulings aren't evidence. Any of my  
10:52 16 comments and questions are not evidence.

10:52 17 Certain physical exhibits have been  
10:52 18 admitted into evidence. You may rely upon such exhibits  
10:52 19 that have been admitted into evidence, even if the  
10:52 20 underlying materials are not here. However, the  
10:52 21 authenticity of those exhibits has in some cases been  
10:52 22 challenged. It's for you to decide how much if any  
10:52 23 weight you give to them. In making that decision you  
10:52 24 should consider all the testimony you heard about the  
10:52 25 way the exhibits were prepared and other indicia of

10:52 1 reliability.

10:52 2 There are two types of evidence you must  
10:52 3 consider. One is direct evidence, such as testimony of  
10:52 4 an eyewitness. The other is circumstantial evidence,  
10:52 5 the proof of circumstances that tend to prove or  
10:52 6 disprove the existence or nonexistence of certain other  
10:52 7 facts. The law makes no distinction between direct and  
10:52 8 circumstantial evidence.

10:52 9 You should use your common sense in  
10:52 10 weighing the evidence. Consider it in light of your  
10:53 11 everyday experience and give it whatever weight you  
10:53 12 think it deserves.

10:53 13 Witnesses. In determining the weight you  
10:53 14 give to the testimony of a witness, you should ask  
10:53 15 yourself whether the evidence tended to show that the  
10:53 16 witness testified falsely about some fact or whether the  
10:53 17 evidence showed that at some other time the witness said  
10:53 18 or did something or failed to say or do something that  
10:53 19 was different from the testimony at trial.

10:53 20 When specialized knowledge or experience  
10:53 21 about a particular matter may be helpful a person who  
10:53 22 has special training or experience in that technical  
10:53 23 field -- we'll call those the expert witnesses -- may  
10:53 24 state his or her opinions on those matters. You need  
10:53 25 not accept the opinion of any of these expert witnesses.

10:53 1 As with any other witness, you're free to decide what  
10:53 2 you rely on.

10:53 3 Summary of contentions. To help you  
10:53 4 follow the evidence, I'm going to summarize the  
10:53 5 positions of the parties. The Plaintiffs in this case  
10:54 6 are IP Innovation, LLC, and Technology Licensing  
10:54 7 Corporation. Those are the Plaintiffs. Mr. Gasey,  
10:54 8 Mr. Hill, and you're familiar with that.

10:54 9 The Defendants are Red Hat and Novell.  
10:54 10 Collectively called the Defendants, and that's Mr.  
10:54 11 Krevitt, Mr. Reiter, Ms. LaValle, and the others.

10:54 12 This case involves three U.S. patents,  
10:54 13 U.S. Patent '412, '521, and '183, each entitled user  
10:54 14 interface with multiple workspaces for sharing display  
10:54 15 system objects, and was originally assigned to Xerox  
10:54 16 Corporation. The patents were later transferred from  
10:54 17 Xerox to the Plaintiffs. For convenience, the parties  
10:54 18 and I will often refer to these three patents as the  
10:54 19 patents-in-suit or by using their last three numbers.

10:54 20 Plaintiffs filed suit in this Court  
10:54 21 seeking money damages from Defendants for allegedly  
10:55 22 infringing the patents-in-suit by using, selling, and  
10:55 23 offering for sale in the United States products and  
10:55 24 processes that the Plaintiffs argue are covered by  
10:55 25 Claims 1 and 21 of the '412 patent, Claim 8 of the '521

10:55 1 patent, and Claim 1 of the '184. You're dealing with  
10:55 2 four claims. Remember that. Plaintiffs also argue that  
10:55 3 Defendants actively induced their customers to infringe  
10:55 4 the patents-in-suit.

10:55 5 Defendants deny that they have infringed  
10:55 6 or actively induced infringement of the asserted claims.  
10:55 7 Defendants also argue that the claims are invalid.

10:55 8 Your job will be to decide whether or not  
10:55 9 Defendants have infringed any asserted claims of the  
10:55 10 patents-in-suit and whether or not those claims are  
10:55 11 invalid. If you decide they have infringed any valid  
10:56 12 asserted claim of the patents-in-suit, you will then  
10:56 13 need to decide any money damages to be awarded to  
10:56 14 Plaintiffs.

10:56 15 Let's talk about the claim interpretation.  
10:56 16 Because only the claims of a patent can be infringed you  
10:56 17 must understand the scope and meaning of the claims  
10:56 18 before undertaking any infringement analysis.

10:56 19 It's my duty to interpret those claims for  
10:56 20 you. It is your duty to apply my interpretation of the  
10:56 21 meanings of the claims to the accused products and the  
10:56 22 use of the accused products.

10:56 23 I'm going to send with you into the  
10:56 24 deliberation room a handout that explains the meanings  
10:56 25 of some of the words of the claims in this case. As

10:56 1 I've previously instructed you, you must accept my  
10:56 2 definition of those words as correct. Any words in the  
10:56 3 claim which I have not provided a definition for, you  
10:56 4 should apply their plain English meaning to those.

10:56 5 You should not take my definition of the  
10:57 6 language of the claims as an indication that I have a  
10:57 7 view regarding how you should decide those issues that  
10:57 8 you are being asked to decide, such as infringement and  
10:57 9 validity. Those issues are yours to decide.

10:57 10 Talk about burdens of proof. Plaintiffs  
10:57 11 have the burden of proving infringement and damages by  
10:57 12 what is called a preponderance of the evidence. That  
10:57 13 means the Plaintiffs have to produce evidence, which  
10:57 14 when considered in light of all the facts, leads you to  
10:57 15 believe that Plaintiffs' claim is more likely true than  
10:57 16 not.

10:57 17 To put it differently, if you were to put  
10:57 18 Plaintiffs' and Defendants' evidence on opposite sides  
10:57 19 of a scale, the evidence supporting Plaintiffs' claims  
10:57 20 would have to make the scale tip on their side.

10:57 21 If you believe that Plaintiffs have met  
10:57 22 their burden of proving patent infringement and damages  
10:57 23 by a preponderance of evidence, you must find in favor  
10:57 24 of Plaintiffs. If you believe that Plaintiffs have not  
10:58 25 met their burden of proof for the patents-in-suit, you

10:58 1 must find in favor of Defendants.

10:58 2 A patent and its claims are presumed to be  
10:58 3 valid. In this case, Defendants claim that the asserted  
10:58 4 claims are invalid. Accordingly, Defendants have the  
10:58 5 burden of proving that each of the claims is invalid by  
10:58 6 a clear and convincing evidence standard.

10:58 7 Clear and convincing evidence is evidence  
10:58 8 that produces in your mind an abiding conviction that  
10:58 9 the claims are invalid. Therefore, for Defendants to  
10:58 10 prevail on the invalidity issue, you must be persuaded  
10:58 11 that it is highly probable that what Defendants seek to  
10:58 12 prove is true.

10:58 13 If you believe that Defendants have met  
10:58 14 their burden of proving invalidity by clear and  
10:58 15 convincing evidence, you must find in favor of  
10:58 16 Defendants. If you believe they have not met their  
10:58 17 burden, you must find in favor of Plaintiffs on the  
10:58 18 issue of validity.

10:59 19 Those of you who are familiar with  
10:59 20 criminal cases will have heard the term beyond a  
10:59 21 reasonable doubt. That burden does not apply in any  
10:59 22 civil case, and, therefore, you should put it out of  
10:59 23 your mind in considering whether Defendants or  
10:59 24 Plaintiffs have met their burden of proof in this case.

10:59 25 Let's talk about the issues you're going

10:59 1 to decide now. Those are infringement, validity, and  
10:59 2 damages.

10:59 3 When you get your verdict form, you'll see  
10:59 4 23 questions. It's really just those three questions  
10:59 5 for each of the Plaintiffs, for each of the Defendants,  
10:59 6 and for each of the claims. I'll explain that as we go  
10:59 7 along.

10:59 8 Infringement, that's assessed on a  
10:59 9 claim-by-claim basis. Therefore, there may be  
11:00 10 infringement as to one claim but not infringement on  
11:00 11 another. In this case, there are two possible ways to  
11:00 12 find that a claim may be infringed, direct infringement  
11:00 13 and active inducement.

11:00 14 Let's talk about the first one, direct  
11:00 15 infringement.

11:00 16 Plaintiffs contend that Defendants  
11:00 17 directly infringed Claims 1 and 21 of the '412 patent  
11:00 18 through the manufacture, use, sale, or offer for sale  
11:00 19 within the U.S. or its territories of server and  
11:00 20 desktop-based operating systems.

11:00 21 Plaintiffs contend that Defendants  
11:00 22 directly infringe Claim 8 of the '521 patent through the  
11:00 23 manufacture, use, sale, or offer to sale within the  
11:00 24 United States of server and desktop-based operating  
11:00 25 system.

11:00 1 They contend that Defendants directly  
11:00 2 infringe Claim 1 of the '183 patent through the  
11:01 3 manufacture, use, sale, or offer for sale within the  
11:01 4 United States of server and desktop-based operating  
11:01 5 systems.

11:01 6 Defendants deny that they have infringed  
11:01 7 any of the asserted claims of the patents-in-suit  
11:01 8 through the manufacture, use, sales, or offer for sale  
11:01 9 within the United States or its territories of their  
11:01 10 server and desktop-based operating systems.

11:01 11 The law. Only the claims of a patent can  
11:01 12 be infringed. Neither the specification, which is the  
11:01 13 written description of the invention, nor the drawings  
11:01 14 of a patent can be infringed. Infringe -- infringement  
11:01 15 is assessed on a claim-by-claim basis. Therefore, as I  
11:01 16 said before, you can have infringement of one claim but  
11:01 17 not another.

11:01 18 To prove infringement of each of the  
11:01 19 patents-in-suit, Plaintiffs have the burden of proving  
11:01 20 by a preponderance of the evidence that during the  
11:01 21 lifetime of the patents-in-suit, the Defendants made,  
11:02 22 used, sold, or offered to sell within the United States  
11:02 23 a product or process that meets all of the requirements  
11:02 24 of a claim of each of the patents-in-suit.

11:02 25 In your analysis of whether the Plaintiffs

11:02 1 meet their burden of proof, you must compare the accused  
11:02 2 products or one's use of the accused products with each  
11:02 3 and every one of the requirements of a claim to  
11:02 4 determine whether all of the requirements of that claim  
11:02 5 are met. If they have not met their burden of proof,  
11:02 6 you must find for Defendants.

11:02 7 Claims 1 and 21 of the '412 patent use the  
11:02 8 phrases display object means for generating, control  
11:02 9 means for accessing and input means for receiving.  
11:02 10 These means for phrases are special phrases in patent  
11:02 11 law. They're called means-plus-function requirements.

11:02 12 Each of these claims cover the structure  
11:03 13 described in the patent that performs that function.  
11:03 14 The claims also cover equivalents to the structure found  
11:03 15 in the patent for that function.

11:03 16 You should apply my definitions of the  
11:03 17 functions and the structures for these  
11:03 18 means-plus-function clauses as you would my definition  
11:03 19 of any other claim term.

11:03 20 A product meets the means-plus-function  
11:03 21 requirements of the claims if two conditions are met:  
11:03 22 It has a structure or set of structures that perform the  
11:03 23 identical function in the claim, and -- and that  
11:03 24 structure or set of structures is either identical to  
11:03 25 or equivalent to the structure that I defined earlier as

11:03 1 performing the function.

11:03 2 A structure is a set of -- or a set of  
11:03 3 structures is equivalent to the structure I have defined  
11:03 4 if a person having ordinary level of skill in the field  
11:04 5 of technology of the patents-in-suit would have  
11:04 6 considered the differences between them to be  
11:04 7 insubstantial at the time the alleged infringement  
11:04 8 occurred.

11:04 9 If you find that the Plaintiffs have met  
11:04 10 their burden of proof, you must find for the Plaintiffs.  
11:04 11 If you find that Plaintiffs have not met their burden of  
11:04 12 proof, you must find for Defendants.

11:04 13 And you will have on your verdict form  
11:04 14 direct infringement. Then you will have for each  
11:04 15 claim -- there are four, remember, a question of whether  
11:04 16 Red Hat directly infringes and whether Novell correctly  
11:04 17 -- directly infringes. Therefore, you will have eight  
11:04 18 questions on direct infringement, one for each claim,  
11:04 19 one for each of the Defendants.

11:04 20 On to indirect. Plaintiffs allege that  
11:05 21 defendants are liable for infringement by actively  
11:05 22 inducing their customers to directly infringe the  
11:05 23 patents-in-suit. Defendants deny that they have  
11:05 24 actively induced their customers to directly infringe  
11:05 25 any of the asserted claims of the patents-in-suit.

11:05 1 Let's talk about the law there. As with  
11:05 2 direct infringement, you must decide whether there's  
11:05 3 been active inducement, and you're to do that on a  
11:05 4 claim-by-claim basis.

11:05 5 In your active inducement analysis, you  
11:05 6 will consider the following factors: Whether the  
11:05 7 Defendants took action during the time of the patent  
11:05 8 which was in force which encourages acts by someone  
11:05 9 else, and the encouraged acts constituted direct  
11:05 10 infringement of that claim, and Defendants were aware of  
11:06 11 the patent and knew or should have known that the  
11:06 12 encouraged acts constitute infringement of that patent,  
11:06 13 and Defendants had an intent to cause those encouraged  
11:06 14 acts, and the encouraged acts were actually carried out  
11:06 15 by someone else.

11:06 16 To prove active inducement of  
11:06 17 infringement, Plaintiffs must prove that each of those  
11:06 18 requirements is met. Further, proof of each element  
11:06 19 must be by preponderance of the evidence.

11:06 20 It's not sufficient that the person or  
11:06 21 company that's allegedly induced to infringe itself  
11:06 22 directly infringed the claims. Nor is it sufficient  
11:06 23 that Defendants were aware of the acts that allegedly  
11:06 24 constitute the direct infringement.

11:06 25 Rather, you must find that Defendants

11:06 1 specifically intended another person or company to  
11:07 2 infringe the patent-in-suit and that such other person  
11:07 3 or company actually engaged in the acts that constitute  
11:07 4 direct infringement to find inducement of infringement.

11:07 5 If you do not find that Defendants  
11:07 6 specifically intended another person or company to  
11:07 7 infringe or if there's no direct infringement by anyone,  
11:07 8 then you must find that Defendants have not actively  
11:07 9 induced the alleged infringement.

11:07 10 Now, you'll have, again, the next eight  
11:07 11 questions will be on inducement. There will be one  
11:07 12 question for each claim and each Defendant. Does Red  
11:07 13 Hat induce? Does Novell induce for each of the claims?  
11:07 14 So there's another eight questions. There's 16 of the  
11:07 15 23 questions already.

11:08 16 Next question. Validity. You'll have one  
11:08 17 question on this. The Inventorship issue. First, the  
11:08 18 parties' contentions. In this case, Defendants contend  
11:08 19 that each of the patents-in-suit is invalid because of  
11:08 20 improper Inventorship.

11:08 21 A patent is invalid if it fails to meet  
11:08 22 the requirement that all of the actual inventors, and  
11:08 23 only the actual inventors, be named as inventors in the  
11:08 24 patent. This is known as the Inventorship requirement.  
11:08 25 The inventors named in an issued patent are presumed

11:08 1 correct, and the Defendants must show improper  
11:08 2 Inventorship by clear and convincing evidence.

11:08 3 Let me tell you the law there. A joint  
11:08 4 invention is the product of collaboration of the  
11:08 5 inventive endeavors of two or more persons working  
11:08 6 towards the same end and producing an invention by their  
11:09 7 aggregate efforts.

11:09 8 To constitute a joint invention, it's  
11:09 9 necessary that each of the inventors work on the same  
11:09 10 subject matter and make some contribution to the  
11:09 11 inventive thought and the final result. Persons may be  
11:09 12 joint or co-inventors even though they do not physically  
11:09 13 work together, do not make the same type or amount of  
11:09 14 contribution, or do not contribute to the subject matter  
11:09 15 of every claim of the patent.

11:09 16 However, individuals cannot be joint  
11:09 17 inventors if they are completely ignorant of what each  
11:09 18 other has done until after their independent efforts.  
11:09 19 They must have directly collaborated through some open  
11:09 20 line of communication during or at approximately the  
11:09 21 time of their inventive effort.

11:09 22 For persons to be joint inventors, there  
11:09 23 must be some element of joint behavior such as  
11:09 24 collaboration or working under common direction, one  
11:09 25 inventor seeking -- seeing a relevant report and

11:09 1 building upon it or hearing another's suggestions at a  
11:10 2 meeting.

11:10 3 In some cases, the interplay between  
11:10 4 conception and collaboration requires that each  
11:10 5 co-inventor engage with the other co-inventors to  
11:10 6 contribute to a joint conception.

11:10 7 That's your instruction on the  
11:10 8 Inventorship.

11:10 9 Now, there's another set of four questions  
11:10 10 dealing with invalidity of each of the four claims by  
11:10 11 anticipation. So you've got 17 so far and another  
11:10 12 four -- math isn't my strong suit, but I think we're up  
11:10 13 to 21.

11:10 14 We're now going to talk about the law  
11:10 15 governing anticipation, the next four questions.

11:10 16 Defendants allege that all asserted claims  
11:10 17 of the patents-in-suit are invalid because they are  
11:11 18 anticipated by certain prior art references, products,  
11:11 19 or systems.

11:11 20 Under the patent laws, a person is  
11:11 21 entitled to a patent only if the invention claimed in  
11:11 22 the patent is new in light of what came before. That  
11:11 23 which came before is referred to as the prior art.

11:11 24 In this case, the following systems are  
11:11 25 prior art, the Chan Room system, the Macintosh Switcher,

11:11 1 and the Amiga Workbench. Defendants allege that the  
11:11 2 listed prior art contains all of the elements of each of  
11:11 3 the claims, all four claims in this suit.

11:11 4 Defendants have the burden of establishing  
11:11 5 by clear and convincing evidence that those claims are  
11:11 6 not new. To prove that the inventions are not new,  
11:11 7 Defend -- Defendants must show that all of the  
11:11 8 requirements of each patent claim are present in a  
11:12 9 single document or system that qualifies as prior art.

11:12 10 The Chan Room system, the Macintosh  
11:12 11 Switcher, and the Amiga Workbench are prior art. So you  
11:12 12 must consider this question for the Chan Room system,  
11:12 13 Macintosh Switcher and Amiga Workbench.

11:12 14 If you find that Defendants established by  
11:12 15 clear and convincing evidence that all of the elements  
11:12 16 are contained in at least one of these documents or  
11:12 17 systems, then you must find that the '412, '521 and '183  
11:12 18 patents are invalid.

11:12 19 If you find the Defendants have not  
11:12 20 carried their burden of proof, then you will find for  
11:12 21 the Plaintiffs.

11:12 22 Something is inherent in an item of prior  
11:12 23 art if it is necessarily present in that prior art or  
11:12 24 necessarily results from the practice of the prior art.  
11:12 25 Inherency may not be established by probabilities or

11:12 1 possibilities. The mere fact that a certain thing may  
11:13 2 coincidentally result from a given set of circumstances  
11:13 3 is not sufficient. A party claiming anticipation by  
11:13 4 inherency must show that the elements of the claim are  
11:13 5 necessarily present in the prior art or necessarily  
11:13 6 result from the practice of the prior art.

11:13 7 Defendants must prove by clear and  
11:13 8 convincing evidence that the inventions recited in these  
11:13 9 claims of the patents-in-suit are inherently present in  
11:13 10 the prior art.

11:13 11 I told you there were 23 questions. We're  
11:13 12 up to 21. That means there are two left. You can guess  
11:13 13 what those are. Damages on each of the -- for each of  
11:13 14 the Defendants. Let's talk about damages generally.

11:13 15 Plaintiffs argue they're entitled to  
11:13 16 damages in the form of a reasonable royalty based on  
11:13 17 Defendants' infringement of the patents-in-suit. If you  
11:14 18 find that Defendants infringed any valid claim of the  
11:14 19 patents-in-suit, then you must determine the amount of  
11:14 20 money damages, if any, to be awarded to the Plaintiffs.

11:14 21 The amount of those damages, if any, must  
11:14 22 be adequate to compensate Plaintiffs for the  
11:14 23 infringement, but in no event less than a reasonable  
11:14 24 royalty for the use made of the invention by the  
11:14 25 Defendants.

11:14 1 You may decide that the parties would have  
11:14 2 agreed to a lump sum, paid-in-full royalty, or a running  
11:14 3 royalty. The damages you award are meant to compensate  
11:14 4 the patentholder. You may not include in your award any  
11:14 5 additional amount as a fine or penalty in order to  
11:14 6 punish Defendants.

11:14 7 Your damages award, if you even reach that  
11:14 8 issue, should put Plaintiffs in approximately the same  
11:14 9 financial position it would have been in had the  
11:14 10 infringement not occurred, but in no event may the  
11:15 11 damages be less than a reasonable royalty for the use  
11:15 12 made of the invention.

11:15 13 Plaintiffs have the burden to establish  
11:15 14 the amount of their damages by a preponderance of the  
11:15 15 evidence. While Plaintiffs may not establish the amount  
11:15 16 of damages by mere speculation or guess, they satisfy  
11:15 17 their burden by showing the extent of damages as a  
11:15 18 matter of just and reasonable inference, even if the  
11:15 19 damages are established as an approximation.

11:15 20 Now, the time period. The damages period  
11:15 21 in this case is from October 2007 through December 10th,  
11:15 22 2008, October 9th to December 10th.

11:15 23 Plaintiffs cannot recover damages for any  
11:15 24 activities of Red Hat or Novell that are alleged to  
11:15 25 infringe the patents-in-suit that occurred before the

11:15 1 Plaintiffs filed this lawsuit, and the patents-in-suit  
11:15 2 expired on December 10, 2008.

11:15 3 Now, let's talk about reasonable royalty.

11:16 4 A royalty is a payment made to a patentholder in  
11:16 5 exchange for the right to make, use, or sell the claimed  
11:16 6 invention. A reasonable royalty is the amount of  
11:16 7 royalty payment that a patentholder and the infringer  
11:16 8 would have agreed to in a hypothetical negotiation  
11:16 9 taking place at a time when the infringement first  
11:16 10 began.

11:16 11 In considering this hypothetical  
11:16 12 negotiation, you should focus on what the expectations  
11:16 13 of the patentholder and the infringer would have been  
11:16 14 had they entered into an agreement at that time and had  
11:16 15 they acted reasonably in their negotiations.

11:16 16 You must also assume that both parties  
11:16 17 believed the patent was valid and infringed. In  
11:16 18 addition, you must assume that the patentholder and  
11:16 19 infringer were willing to enter into an agreement. Your  
11:16 20 role is to determine what that agreement would have  
11:16 21 been.

11:16 22 The measure of damages is what royalty  
11:16 23 would have resulted from the hypothetical negotiation  
11:17 24 and not simply what royalty either party would have  
11:17 25 preferred. It's negotiation, remember.

11:17 1 In this trial, you have heard evidence of  
11:17 2 things that happened after the infringement began. That  
11:17 3 evidence can be considered only to the extent that the  
11:17 4 evidence aids you in assessing what royalty would have  
11:17 5 resulted from a hypothetical negotiation.

11:17 6 With respect to the license agreement  
11:17 7 entered into between Apple and Plaintiffs, you should  
11:17 8 keep in mind that when Plaintiffs sued Apple, the law  
11:17 9 allowed Plaintiffs to receive damages for at least  
11:17 10 Apple's internal use that predated the filing of the  
11:17 11 lawsuit by six years in addition to the 1.5 years that  
11:17 12 were left on the life of the patents.

11:17 13 If you find any claim of the  
11:17 14 patents-in-suit to be infringed and valid, you must  
11:18 15 decide the amount of damages in the form of a reasonable  
11:18 16 royalty you find Plaintiffs have proven by a  
11:18 17 preponderance of the evidence. You may decide that  
11:18 18 Plaintiffs and Defendants would have agreed to a lump  
11:18 19 sum, paid-in-full royalty at the -- at the hypothetical  
11:18 20 negotiation. Alternatively, you may decide that they  
11:18 21 would have agreed to a running royalty.

11:18 22 To decide an amount based on a running  
11:18 23 royalty, you must first decide the approximate (sic)  
11:18 24 royalty base. If you decide to apply a royalty on a per  
11:18 25 unit base, the royalty base can be the number of

11:18 1 infringing units distributed. Where a patent  
11:18 2 contributes only part of the value of a larger product,  
11:18 3 a patentee's damages are generally limited to the part  
11:18 4 of the value created by the patent.

11:18 5 In determining the reasonable royalty, you  
11:18 6 should consider all of the facts known and available to  
11:18 7 the parties at the time the infringement began.

11:18 8 Some of the factors you may consider in  
11:19 9 making your determination are: The royalties received  
11:19 10 by the patentholder for the licensing of the  
11:19 11 patents-in-suit tending to prove an established royalty  
11:19 12 at the time, the nature and scope of those existing  
11:19 13 licenses as exclusive or nonexclusive or as restricted  
11:19 14 or nonrestricted in terms of territory if -- or with  
11:19 15 respect to whom the manufactured product may be sold;  
11:19 16 the effect of selling the patented specialty in  
11:19 17 promoting sales of other products of the licensee, the  
11:19 18 existing value of the invention to the licensor as a  
11:19 19 generator of sales of nonpatented items and the extent  
11:19 20 of such derivative or convoyed sales; the duration of  
11:19 21 the patent and the term of the license; the nature of  
11:19 22 the patented invention and the benefits to those who  
11:19 23 would have used the invention; the extent to which the  
11:20 24 invention -- the infringer has made use of the invention  
11:20 25 and any evidence probative of the value of that use; the

11:20 1 opinion and testimony of qualified experts; or any other  
11:20 2 factors which in your mind would have increased or  
11:20 3 decreased the royalty the infringer would have been  
11:20 4 willing to pay and the patentholder would have been  
11:20 5 willing to accept, acting as normally prudent business  
11:20 6 people.

11:20 7 All right. That covers damages.

11:20 8 Now I have a few instructions for how you  
11:20 9 reach your verdict. That concludes the part of my  
11:20 10 instructions explaining the rules for considering the  
11:20 11 testimony and the evidence. Now let me tell you how you  
11:20 12 conduct your deliberations and your possible verdicts.

11:20 13 Counsel for Plaintiffs and Defendants will  
11:20 14 now make their closing statements. Once they complete  
11:20 15 their statements, that's your time to start deliberating  
11:21 16 in the jury room. In fact, it's your duty to talk with  
11:21 17 each other about the evidence and make every reasonable  
11:21 18 effort you can to reach unanimous agreement.

11:21 19 Each of you must decide the case for  
11:21 20 yourself, but do so only after an impartial  
11:21 21 consideration of the evidence with your fellow jurors.  
11:21 22 Your verdict, after all, however, must be unanimous.

11:21 23 After you are released to the jury room,  
11:21 24 you shall select one of your member of the jury as the  
11:21 25 foreperson. The foreperson will preside over the

11:21 1 deliberations and speak for you when you return here to  
11:21 2 Court. After that, you should begin your deliberations.

11:21 3 Once you start deliberating, do not talk  
11:21 4 to the jury officer or to me or to anyone except each  
11:21 5 other about the case. If you have any questions or  
11:21 6 messages, you must write them down on a piece of paper,  
11:22 7 sign them, and give them to the Marshal.

11:22 8 Jan, who will that be? There will be a  
11:22 9 Marshal outside the door. Knock on the door, he will  
11:22 10 answer, you will give him the written question, and he  
11:22 11 will give them to me, and I will respond as soon as I  
11:22 12 can. I may want to speak to counsel about what you've  
11:22 13 asked, so it may take a little time to get back to you.  
11:22 14 You can continue your deliberations while you're  
11:22 15 waiting.

11:22 16 Any questions or messages normally should  
11:22 17 be sent to me through your foreperson. Do not ever  
11:22 18 write down or tell anyone how you stand on your votes.  
11:22 19 For example, do not write down or tell anyone that you  
11:22 20 are split 8 to 3 or 6 to 5 or whatever your vote happens  
11:22 21 to be. That should stay secret until you are finished.

11:22 22 A verdict form has been prepared for you.  
11:23 23 I told you that. The verdict form contains all the  
11:23 24 questions that we've gone over. After you've reached  
11:23 25 the unanimous agreement on a verdict, your foreperson

11:23 1 will fill in the verdict form, sign it, date it, and  
11:23 2 advise the Court you've reached a verdict.

11:23 3 Let me finish by repeating something I  
11:23 4 said earlier. Nothing I've said or done during this  
11:23 5 trial was meant to influence your decision in any way.  
11:23 6 You must decide this case yourselves based on the  
11:23 7 evidence presented. Once the lawyers have finished  
11:23 8 their closing statements, I will release you to the jury  
11:23 9 room.

11:23 10 The exhibits are already there for your  
11:23 11 consultation. Before you stop your deliberations this  
11:23 12 evening, you should request my permission to leave. If  
11:23 13 you've not reached a verdict this evening, you should be  
11:23 14 here tomorrow morning promptly at 9:00 a.m. to begin  
11:23 15 your deliberation for a second day, if that is  
11:23 16 necessary, and so on until your verdict is reached.

11:24 17 That final sentence just says thank you,  
11:24 18 and that's not enough. You should feel proud of  
11:24 19 yourselves. This is your duty, but you've done it very  
11:24 20 well.

11:24 21 Counsel?

11:24 22 MR. REITER: Your Honor, may I approach?

11:24 23 THE COURT: Yes, you may.

11:24 24 (Bench conference.)

11:24 25 MR. REITER: Your Honor, I'm sorry, there

11:24 1 was just one statement, you read, you must first decide  
11:24 2 the approximate royalty basis. It reads appropriate.

11:24 3 Given all the issues --

11:24 4 THE COURT: I'll reread it.

11:24 5 MR. REITER: Okay.

11:24 6 THE COURT: What page?

11:24 7 MR. REITER: Page 14. You said,  
11:24 8 approximate. It should be appropriate.

11:24 9 THE COURT: Okay.

11:25 10 (Bench conference concluded.)

11:25 11 THE COURT: I need to re-read a sentence  
11:25 12 because I made a mistake.

11:25 13 To decide on an amount based on a running  
11:25 14 royalty, you must first decide the approximate royalty  
11:25 15 base. I think I said appropriate.

11:25 16 MR. REITER: No, it's appropriate.

11:25 17 THE COURT: Oh, excuse me. Let me say  
11:25 18 that again.

11:25 19 To decide on an amount based on a running  
11:25 20 royalty, you must first decide the appropriate royalty  
11:25 21 base, the appropriate royalty base.

11:25 22 I misread it because -- it was my mistake.  
11:25 23 Appropriate is what you're deciding.

11:26 24 MR. GASEY: Your Honor, one other issue.  
11:26 25 May I approach?

11:26 1 THE COURT: Yes, you certainly may.

11:26 2 (Bench conference.)

11:26 3 MR. GASEY: This is a matter of mechanics  
11:26 4 or fairness. I just wonder if -- if we're going to all  
11:26 5 do our closing before lunch -- before breaking for  
11:26 6 lunch, that's fine. I just don't want to have it where  
11:26 7 I'm doing my closing and then they get lunch.

11:26 8 THE COURT: No, it's a fair point. Do  
11:26 9 both or let's decide that right now.

11:26 10 MR. GASEY: Right. Right.

11:26 11 THE COURT: So let's decide that right  
11:26 12 now. I'd -- I'd propose to just kind of ask the jury  
11:26 13 what they want to do. If they want to go two hours now  
11:26 14 or --

11:26 15 MR. KREVITT: We -- we should take a  
11:26 16 break.

11:26 17 THE COURT: Do they want to go two hours  
11:26 18 now before lunch? Let's ask them.

11:26 19 MR. GASEY: Sure.

11:26 20 THE COURT: Okay.

11:26 21 (Bench conference concluded.)

11:26 22 THE COURT: This is that point where we're  
11:26 23 going to make some decisions, and I'm going to do an  
11:26 24 unusual thing, and that is, consult my jury.

11:26 25 Now, you're not allowed to speak in Court,

11:26 1 but you can nod your heads or shake your heads. And  
11:27 2 what I'm inquiring is each Counsel has an hour. We have  
11:27 3 two alternatives. We can take a break, ten minutes,  
11:27 4 return and do two hours of their closing statements,  
11:27 5 with a slight break in between each one, and then you  
11:27 6 would retire to begin your deliberations and eat lunch.

11:27 7                   Or the alternative is we could have lunch  
11:27 8 now, return, do our two hours, and then I will release  
11:27 9 you to begin your deliberations. The question is do you  
11:27 10 want lunch now or at 1:30, approximately?

11:27 11                   How many are -- how many by the nod system  
11:27 12 are for eating lunch now? How many want to eat lunch at  
11:28 13 1:30? I think I saw a preponderance of nods in favor of  
11:28 14 1:30. But I promised you a break. Let's take a break  
11:28 15 now, we'll come back, and we'll hear from counsel.  
11:29 16 Five, ten minutes.

11:29 17                   (Jury out.)

11:29 18                   MR. GASEY: I wasn't sure if Your Honor  
11:29 19 wanted to go through the remaining exhibits now.

11:29 20                   THE COURT: Yeah, let's do that. We might  
11:29 21 as well do it now. We need them on the record.

11:29 22                   Mr. Stewart?

11:30 23                   All right, Ms. Dickman, you're going to  
11:30 24 talk to me.

11:30 25                   MS. DICKMAN: Plaintiffs would like to

11:30 1 offer the following exhibits to be admitted into  
11:30 2 evidence, PX317.

11:30 3 MR. STEWART: We have an objection.

11:30 4 THE COURT: 317, just a second. I've got  
11:30 5 to write down. Okay. Go ahead.

11:30 6 MS. DICKMAN: PX285, PX278.

11:30 7 MR. STEWART: I'm sorry. Was that 278?

11:30 8 MS. DICKMAN: Yep. PX279.

11:30 9 MR. STEWART: We have an objection with  
11:30 10 that one.

11:30 11 THE COURT: Got it.

11:30 12 MS. DICKMAN: Mr. Vickrey said DX997, but  
11:30 13 what was actually put up was DX809. So we'd like to  
11:30 14 offer 809.

11:31 15 THE COURT: Okay. 809.

11:31 16 MR. STEWART: Your Honor, if I may real  
11:31 17 quick, I didn't have 278 on there, and I believe we  
11:31 18 would have an objection with that, as well.

11:31 19 THE COURT: I'm not clear, Mr. Stewart.  
11:31 20 Which one do you have an objection to?

11:31 21 MR. STEWART: 278, 279, and 317 thus far.

11:31 22 THE COURT: Okay. Good. But not 809?

11:31 23 MR. STEWART: Correct.

11:31 24 THE COURT: Thank you.

11:31 25 MS. DICKMAN: One other we'd like to offer

11:31 1 PX316.

11:31 2 MR. STEWART: We'll have an objection to  
11:31 3 that.

11:31 4 MS. DICKMAN: It was already admitted.

11:31 5 THE COURT: I need to hear your objections  
11:31 6 on 317, 278 and 9.

11:31 7 MR. REITER: These are articles that came  
11:31 8 up with Mr. Gemini. We had raised objections already on  
11:31 9 hearsay grounds. You sustained the objections. I think  
11:31 10 they just came up again with Dr. Putnam.

11:31 11 THE COURT: They were used for  
11:31 12 impeachment, and they were appropriate in that context.

11:31 13 MR. REITER: I don't know if it was  
11:31 14 impeachment, but just to talk about -- like a Ubuntu  
11:31 15 article, that kind of thing.

11:31 16 THE COURT: I think I had earlier --

11:32 17 MR. REITER: Sustained.

11:32 18 THE COURT: -- not admitted those. Which  
11:32 19 ones were those?

11:32 20 MR. STEWART: 279 -- 278, 279 and 317.

11:32 21 THE COURT : Okay. Good. Then those are  
11:32 22 not admitted.

11:32 23 Mr. Stewart, do you have something for me?

11:32 24 MR. STEWART: Yes. The Defendants would  
11:32 25 like to offer DX739, DX740, DX770, DX773, DX904, and

11:32 1 DX936.

11:32 2 MS. DICKMAN: We object to DX936.

11:32 3 THE COURT: 936. Mr. Gibbons, is that  
11:32 4 you?

11:32 5 MR. GIBBONS: Dr. Putnam's report.

11:32 6 THE COURT: That's what?

11:32 7 MR. GIBBONS: That's Dr. Putnam's report.

11:32 8 MR. REITER: That's the whole report?

11:32 9 MS. DICKMAN: Yeah.

11:32 10 MR. REITER: Okay. We're not going to  
11:32 11 offer it.

11:32 12 THE COURT: Okay. Then 936 is not  
11:32 13 permitted.

11:32 14 MS. DICKMAN: Thank you, Your Honor.

11:32 15 THE COURT: And we now have a complete  
11:32 16 record, right?

11:32 17 MS. DICKMAN: Yes, Your Honor.

11:32 18 THE COURT: And Ms. Dickman and Mr.  
11:33 19 Stewart will go into the hall, extract from the boxes  
11:33 20 everything which has not been admitted, they'll check  
11:33 21 each other, and then the boxes will be in the jury room  
11:33 22 when they go back in.

11:33 23 COURT ROOM DEPUTY: Will I get a complete  
11:33 24 list of the exhibits?

11:33 25 MS. DICKMAN: As they're being admitted?

11:33 1 COURT ROOM DEPUTY: Yes. I need --  
11:33 2 MS. DICKMAN: I think ours is complete  
11:33 3 already because the things that were not permitted were  
11:33 4 not on our list, and the things that were permitted were  
11:33 5 already admitted for us.

11:33 6 COURT ROOM DEPUTY: So everything from  
11:33 7 yesterday is correct that I have.

11:33 8 MS. DICKMAN: Yes. Yes, ma'am.

11:33 9 MR. STEWART: I'll have to check on it.

11:33 10 MR. GIBBONS: Your Honor, should we start  
11:33 11 pulling these boxes out of the courtroom right now?

11:33 12 THE COURT: Yes, please do.

11:33 13 MS. DICKMAN: Would you like us to leave  
11:33 14 the exhibits that are going back there in the boxes,  
11:33 15 because I think the larger --

11:33 16 THE COURT: Yes.

11:33 17 MS. DICKMAN: -- volume is what's not  
11:33 18 going back --

11:33 19 MR. REITER: It's not going to be much.

11:33 20 MS. DICKMAN: Yeah.

11:33 21 MR. REITER: How many exhibits do we have  
11:33 22 total?

11:33 23 MS. DICKMAN: I think you guys have maybe  
11:33 24 30, and we have maybe 70.

11:33 25 THE COURT: I'll trust -- I'll trust your

11:33 1 judgment, Mr. Stewart and Ms. Dickman about -- maybe you  
11:34 2 can put them all in a box or two and send them back.

11:34 3 MR. GIBBONS: You know, once -- once the  
11:34 4 jury is dismissed to begin deliberation, we can pull the  
11:34 5 boxes in here and then bring them in --

11:34 6 THE COURT: It would be nice if they were  
11:34 7 in there already.

11:34 8 MR. GIBBONS: We can do that, too.

11:34 9 THE COURT: Yeah, do that. Just have them  
11:34 10 in there.

11:34 11 MR. GIBBONS: Fair enough.

11:34 12 THE COURT: And --

11:34 13 MR. GASEY: One exception, Your Honor,  
11:34 14 because I'd like to reference them in the close, would  
11:34 15 be the original diskettes.

11:34 16 THE COURT: Oh, yeah, yeah, anything  
11:34 17 that's going to be used, absolutely.

11:34 18 MR. GASEY: Thank you.

11:34 19 THE COURT: By either one. Okay. Give me  
11:34 20 a minute and then we'll start.

11:34 21 (Recess.)

11:34 22 (Jury in.)

23 THE COURT: Please be seated.

11:42 24 Mr. Gasey?

11:42 25 MR. GASEY: Yes, Your Honor. I'm going to

11:42 1 do the closing. I promise I'll take less than 40  
11:42 2 minutes. I promise. I promise. And then my co-counsel  
11:42 3 will go ahead and do the rebuttal with the remainder of  
11:42 4 the time.

11:42 5 THE COURT: That will be fine.

11:42 6 MR. GASEY: Thank you, Your Honor.

11:43 7 Good morning again. This is a case about  
11:43 8 the fundamental clash between the Defendants, leaders of  
11:43 9 the open-source community, and my clients, the patent  
11:43 10 owners. This clash, of course, is over whether they  
11:43 11 have the right to use and distribute --

11:43 12 THE COURT: Excuse me, Mr. Gasey. Just a  
11:43 13 matter of record, you can stand wherever you want, but  
11:43 14 could I put a mic in your hand?

11:43 15 MR. GASEY: Too soft?

11:43 16 THE COURT: Well, no, you sound just  
11:43 17 great, but we record everything, and believe it or not,  
11:43 18 what you say is important.

11:43 19 MR. GASEY: Can I have Your Honor talk to  
11:43 20 my wife?

11:43 21 THE COURT: I'm not going that far.

11:43 22 MR. GASEY: This clash -- this case is  
11:43 23 over whether or not the Defendants have the right to use  
11:43 24 and distribute what is provided for, what is protected  
11:43 25 in other people's patents, my clients' property, without

11:44 1 paying for it.

11:44 2 Now, this is the part of the case where  
11:44 3 you're going to have to decide a lot of different  
11:44 4 questions. The Judge has pointed out that there's 23  
11:44 5 different questions that you're going have to answer.

11:44 6 Now, there's going to be four basic  
11:44 7 issues -- Ms. Harper, go ahead and put up Slide 2?

11:44 8 Four basic issues that you're going to  
11:44 9 have to decide, the first of which is infringement; the  
11:44 10 second of which deals with validity, and part of that is  
11:44 11 the issue of Inventorship; and then finally is the issue  
11:44 12 of damages.

11:44 13 Now, I'm going to go ahead and try and  
11:44 14 walk through the actual verdict form that you're going  
11:44 15 to be sent back to go ahead and deliberate with. And  
11:44 16 part of the -- part of the purpose of this is to go  
11:44 17 ahead and organize my thoughts in summary that I'd like  
11:44 18 you to keep in mind as you're going through deciding the  
11:44 19 questions that it is your duty to figure out. You are  
11:45 20 the judges of those issues.

11:45 21 Now, the first issue that you're going to  
11:45 22 be deciding on your verdict form is the issue of  
11:45 23 damages -- excuse me -- the issues of infringement. I'm  
11:45 24 sorry.

11:45 25 As the Judge mentioned, there is going to

11:45 1 be a series of a total of 16 questions. The first eight  
11:45 2 questions are broken down on a claim-by-claim basis, one  
11:45 3 claim for each Defendant. So Claim 1 for the '412  
11:45 4 patent, the question is whether or not it's infringed by  
11:45 5 the Plaintiffs -- excuse me -- by Novell, whether or not  
11:45 6 it's infringed by Red Hat.

11:45 7 And then it goes through Claim 21 for the  
11:46 8 same question. Then it goes through Claim 8 of the '521  
11:46 9 patent, and finally it goes through Claim 1 of the '183  
11:46 10 patent. All the same question, whether or not by a  
11:46 11 preponderance of the evidence, 50/50 plus one tiny bit  
11:46 12 favors my clients.

11:46 13 If that's the case, if that burden is met,  
11:46 14 then there's infringement. And the reason why there are  
11:46 15 separate questions is because each claim, remember, is  
11:46 16 its own separate piece of property. It's got its own  
11:46 17 separate boundaries, its own separate rights.

11:46 18 You can find infringement of some claims  
11:46 19 or not others, and the same holds true for validity as  
11:46 20 well. There's a different scope, a different fence  
11:46 21 around the yard.

11:46 22 Now, direct infringement can be shown a  
11:46 23 number of different ways. The evidence that we have  
11:46 24 presented and that shows direct infringement by the  
11:47 25 Defendants is use of the software in an infringing

11:47 1 method or in an infringing system.

11:47 2 What does that mean?

11:47 3 What that means is, the Novell and Red Hat  
11:47 4 software has been used by the Defendants in such a  
11:47 5 matter to go ahead and infringe each of the different  
11:47 6 claims. They've been used in computers with displays  
11:47 7 and with keyboards and have been used in the switching  
11:47 8 feature that goes ahead and reads on the asserted  
11:47 9 claims.

11:47 10 And there's going to be several different  
11:47 11 types of evidence on this, and obviously because I  
11:47 12 really do want to try and move along, there's only going  
11:47 13 to be a few different points I'm going to show. But the  
11:47 14 jury instructions that the Judge showed you and read to  
11:47 15 you indicated that there's two different types of  
11:47 16 evidence.

11:47 17 And there's direct evidence, such as shown  
11:47 18 by testimony of an eyewitness, and the other type of  
11:48 19 evidence is what's called circumstantial evidence, the  
11:48 20 proof of circumstances that tend to prove or disprove  
11:48 21 the existence or non-existence of certain other facts.

11:48 22 I think an easy way to go ahead and give  
11:48 23 an example of what that sort of circumstantial evidence  
11:48 24 means is an example of, if you were to go to some kind  
11:48 25 of tropical island, you felt you discovered it first,

11:48 1 and you wanted to see if there had been any humans there  
11:48 2 before. Now, you might see a human; you might see a  
11:48 3 person walking around on the beach, and you would know  
11:48 4 that's direct evidence. You are the eyewitness to that  
11:48 5 fact.

11:48 6 But there's also a possibility that you  
11:48 7 might not see anybody. There might not be any direct  
11:48 8 evidence, but you might see a footprint in the sand.  
11:48 9 And using your common sense, you're going to realize  
11:48 10 that there's a person that's there or at least that has  
11:48 11 been there. That's that kind of circumstantial  
11:48 12 evidence.

11:48 13 The direct evidence and the circumstantial  
11:48 14 evidence supports the infringement of the claims  
11:49 15 asserted in this case.

11:49 16 Now, first the direct evidence. On  
11:49 17 Tuesday afternoon, I think it was, my co-counsel,  
11:49 18 Mr. Gibbons, went ahead and read in some deposition  
11:49 19 testimony. We tried to be brief, and I know that it has  
11:49 20 a different effect versus seeing somebody live, but it  
11:49 21 is direct evidence. It is direct commentary by the  
11:49 22 Defendants' witnesses.

11:49 23 Now, one of the witnesses you heard  
11:49 24 from -- I'll put it up on the ELMO.

11:49 25 Now, one of the witnesses that you heard

11:49 1 from was a gentleman by the name of Markus Rex. Mr. Rex  
11:50 2 testified in his deposition as follows -- well, there's  
11:50 3 testimony from Mr. Rex where he testified he used -- do  
11:50 4 you remember the spinning cube examples that were shown?

11:50 5 He testified that he used the spinning  
11:50 6 cube. If you recall from notes that you took during his  
11:50 7 deposition that was read in on Tuesday, he testified  
11:50 8 that he used the spinning cube, and he used a keyboard  
11:51 9 to go ahead and switch from face to face.

11:51 10 In other words, he directly infringed --  
11:51 11 here we go, Slide 20. Thank you.

11:51 12 Mr. Rex testified: When I've used the  
11:51 13 cube as an individual user, I switched one of two ways.  
11:51 14 Control alt -- and that's a keyboard command -- right  
11:51 15 arrow, slash, left arrow. In other words, he went ahead  
11:51 16 and clicked on the cube itself on the screen. So in  
11:51 17 other words, he used it on a system that had a screen,  
11:51 18 that had a keyboard, an input means, and he went ahead  
11:51 19 and used it in an infringing manner, switching from one  
11:51 20 workspace to another.

11:51 21 He's not the only person, though. We have  
11:51 22 testimony from Matthias Clasen. Now he is a senior  
11:51 23 engineering representative of Defendant Red Hat, but Red  
11:51 24 Hat, for whatever reason, decided to call him here  
11:51 25 today. So we went ahead and read his testimony in as

11:51 1 well on Tuesday afternoon.

11:52 2                   What he testified to, you may recall, is  
11:52 3 testing that he performed as work on behalf of Red Hat.  
11:52 4 And he tested the graphical user interface, the GUI, to  
11:52 5 start the computer and check that the graphical user  
11:52 6 interface is in front of him.

11:52 7                   What he further testified to is that he  
11:52 8 tested each and every user function on the screen. That  
11:52 9 includes the switching function. He is another example  
11:52 10 of direct infringement by the Defendants.

11:52 11                  There's a third example of infringement  
11:52 12 that was read in in that testimony by a marketing  
11:52 13 representative, a gentleman by the name of Mr. Justin  
11:52 14 Steinman. You heard him live on Thursday, but you also  
11:52 15 heard his deposition testimony on Tuesday afternoon.

11:52 16                  And he testified as follows: When you use  
11:52 17 the Novell product and you're clicking from desktop to  
11:52 18 desktop with your mouse, do you click on the icons?

11:53 19                  Answer: I actually use the keyboard  
11:53 20 personally.

11:53 21                  You're clicking on the icons, right?

11:53 22                  Yes. Sometimes I click on the icons, yes.

11:53 23                  He's another user. We have evidence from  
11:53 24 the users themselves, from the Defendants themselves an  
11:53 25 admission that they go ahead and use the product in the

11:53 1 infringing manner.

11:53 2 We also have circumstantial evidence  
11:53 3 showing the use of the product by the Defendants, and  
11:53 4 we'll get into that in a little bit, because that also  
11:53 5 applies to the other legal standard for infringement,  
11:53 6 inducement of infringement.

11:53 7 What does that evidence include?

11:53 8 It includes things like product  
11:53 9 literature, training materials, instructions. And  
11:53 10 you'll see from the actual instruction manuals, the user  
11:53 11 guides and other materials that you'll be able to take  
11:53 12 back with you to the jury room, they show things like  
11:53 13 screen shots showing the actual product in use.

11:53 14 The only way that they created those kinds  
11:54 15 of screen shots, those kinds of things with a switching  
11:54 16 windows, was for somebody to go ahead and use the  
11:54 17 product in an infringing manner. It's circumstantial  
11:54 18 evidence showing that somebody at Novell, somebody at  
11:54 19 Red Hat went ahead and used the product in an infringing  
11:54 20 manner to help create the product literature that  
11:54 21 encourages their customers to go ahead and infringe.

11:54 22 Here's an example. You've got  
11:54 23 descriptions of the Novell rotating cube. It talks  
11:54 24 about the ability and walking through the steps of how  
11:54 25 to go ahead and move around the cube and go switch from

11:54 1 desktop to desktop, to switch from workspace to  
11:54 2 workspace.

11:54 3 Now, we also have the issue of inducement.  
11:54 4 Inducement, as the Court pointed out to you, involves a  
11:54 5 series of steps. I'll read them from the Judge's jury  
11:55 6 instructions. Inducement involves five different  
11:55 7 points. That the Defendants took action during the time  
11:55 8 period when the patent was in force that encouraged acts  
11:55 9 by somebody else;

11:55 10 Second, that they encouraged acts that  
11:55 11 constituted direct infringement. In other words, they  
11:55 12 encouraged people to go ahead and use their products in  
11:55 13 an infringing manner;

11:55 14 That -- third, that the Defendants knew or  
11:55 15 were aware of the patent and knew or should have known  
11:55 16 that what they encouraged their customers -- what they  
11:55 17 encouraged the people that received their software to  
11:55 18 do, that those acts would constitute infringement.

11:55 19 And that the Defendants had an intent to  
11:55 20 cause the encouraged acts. In other words, they wanted  
11:55 21 to cause their customers, the people that received their  
11:55 22 software to use that software in that way.

11:56 23 And that finally that their encouraged  
11:56 24 acts were actually carried out by somebody else.

11:56 25 Now, some of the evidence you need to keep

11:56 1 in mind as we go through these points. These -- by the  
11:56 2 way, these questions are Questions 9 through 16 on your  
11:56 3 verdict form. They deal with inducement as opposed to  
11:56 4 direct infringement, but otherwise they track the same  
11:56 5 claims that are found on Questions 1 through 8 of your  
11:56 6 verdict form.

11:56 7 Some of the evidence that you need to  
11:56 8 consider when you're looking at what constitutes  
11:56 9 inducement, I think, frankly, a good example, a very  
11:56 10 good example of that is you remember when we heard  
11:56 11 evidence about Novell and their efforts. They spent  
11:56 12 1500 hours of video time studying and looking at and  
11:56 13 encouraging their users to figure out ways for their  
11:57 14 users to better use their products, to take the features  
11:57 15 that they wanted to work well and incorporate them into  
11:57 16 their products and fix what didn't work as well.

11:57 17 One of the things that they went ahead and  
11:57 18 would promote that encouragement through was through  
11:57 19 videotaping users, monitoring their use, creating tests  
11:57 20 analyzing their use, and posting the results so people  
11:57 21 could go ahead and see the dozens of different features  
11:57 22 in their accused products and their accused software and  
11:57 23 see how people would use it, see how people could figure  
11:57 24 out how to better take advantage of each of those  
11:57 25 features. And one of those features was the ability to

11:57 1 go ahead and switch desktops.

11:57 2 Would you go ahead and play that video?

11:57 3 (Video played.)

09:11 4 QUESTION: Can you move this picture to  
09:11 5 the part of the cube that has the other insets.

09:11 6 ANSWER: Let's first see where it is.

09:11 7 Control alt.

09:11 8 Uh-huh, there maybe it's this. I wonder  
09:11 9 what would happen if I just kind of drag this window to  
09:11 10 the right.

09:11 11 Aha. There we go. Wow.

11:58 12 (End of video clip.)

11:58 13 MR. GASEY: There's an example. There's a  
11:58 14 website, videotape on that website, reports about that  
11:58 15 videotape on that website, all sponsored by Novell to go  
11:58 16 ahead and physically have somebody sitting there and  
11:58 17 instructing somebody how to use the accused device, how  
11:58 18 to go ahead and take advantage of the switching feature.

11:58 19 That is the kind of evidence that supports  
11:58 20 inducement of infringement of these claims.

11:59 21 Now, it's not just looking at pictures.

11:59 22 The words of the claims matter.

11:59 23 If you could go ahead and go to Slide 15.

11:59 24 We won't go through the element-by-element  
11:59 25 process, because we want to make good use of time.

11:59 1                   But you'll recall when Dr. Zimmerman was  
11:59 2 up on the stand and went through the claims in an  
11:59 3 element-by-element analysis. And that's going to be  
11:59 4 part of your duty. Part of your job today is to go  
11:59 5 ahead and look at each element of each asserted claim  
11:59 6 and compare that with what is in Red Hat's and Novell's  
11:59 7 systems.

11:59 8                   And for those claim elements for which  
11:59 9 Novell and Red Hat do not distribute themselves, you  
11:59 10 need to consider two questions.

11:59 11                  For direct infringement, do they use their  
11:59 12 software and systems that include displays, systems that  
11:59 13 include user input devices, things like mouses and  
12:00 14 keyboards, or do they go ahead and encourage their  
12:00 15 customers to go ahead and use their software in such  
12:00 16 systems?

12:00 17                  Now, the Defendants are going to point out  
12:00 18 a bunch of defenses. I think they boil down to about  
12:00 19 three big issues. The first one -- go to Slide 39 -- is  
12:00 20 they say, you know what, we don't use any displays. We  
12:00 21 have all sorts of servers, and those servers are just  
12:00 22 big boxes, and nobody can go ahead and see an image on  
12:00 23 those big boxes. You've got big corporate data centers.

12:00 24                  You heard evidence from one of the  
12:00 25 witnesses, testimony from them that there was a server

12:00 1 center that was as big as Texas Stadium.

12:00 2                   The question you need to ask yourself is,  
12:00 3 who do you think puts that material on their servers?

12:00 4                   The people that put that kind of material  
12:01 5 on their servers are folks that are known generally as  
12:01 6 system administrators. And what they need to do in  
12:01 7 order to put that material on -- go to Slide 41 -- is  
12:01 8 they need to have a computer interface.

12:01 9                   Now, sometimes it may be remote; sometimes  
12:01 10 it may be local, but the point is, the thing that's  
12:01 11 relevant is they need to have a display to go ahead and  
12:01 12 see how things are getting installed.

12:01 13                  And that display, when it's provided using  
12:01 14 the Defendants' software, includes a switching feature  
12:01 15 such as what infringes the claims of these  
12:01 16 patents-in-suit.

12:01 17                  Now, you remember also hearing a lot of  
12:01 18 testimony about the fact that Fedora and openSUSE are  
12:01 19 training grounds. I think they're even referred to by  
12:01 20 the Defendants or their lawyers as a training camp to go  
12:01 21 ahead and see who makes the cut.

12:01 22                  The question you need to ask is, if this  
12:01 23 is a feature that made the cut -- remember, there are  
12:01 24 separate products for the desktop software and the  
12:02 25 server software. It was a feature that they didn't

12:02 1 really need. In other words, if the GNOME, the  
12:02 2 graphical user interface that provides the windows  
12:02 3 environment for operating in this fashion wasn't  
12:02 4 necessary, why would they offer it in a server software  
12:02 5 package?

12:02 6 Second defense the Defendants have --  
12:02 7 really, they're related defenses. You heard a lot of  
12:02 8 talk about flexibility and continuity. They had a  
12:02 9 series of demonstrations and PowerPoints going ahead and  
12:02 10 showing how there was no continuity between different  
12:02 11 workspaces, that things weren't perceptible as the same  
12:02 12 tool.

12:02 13 And the thing you need to keep in mind,  
12:02 14 the thing that's contained within your jury instructions  
12:02 15 is words. In patent law and patent claims words count.  
12:02 16 There's two sources of words you need to consider in  
12:02 17 this case.

12:02 18 One is the patent claim language itself.

12:03 19 If we could go to -- let's go back to the  
12:03 20 Slide 15.

12:03 21 You've got claim language that's unique to  
12:03 22 each of the claims. There's some overlapping terms, but  
12:03 23 each of them are unique on their own. And you heard  
12:03 24 testimony from Dr. Gray during his -- I think it's  
12:03 25 Mr. Gray actually -- during his cross-examination where

12:03 1 he admitted that when you look at all the claims  
12:03 2 asserted in all the patents, there isn't one of them  
12:03 3 that uses the word flexibility or the word continuous --  
12:03 4 or continuity.

12:03 5 It's something that is outside the  
12:03 6 boundaries of the claims. Again, if you think about  
12:03 7 each claim as a fence defining a piece of property,  
12:03 8 they're going ahead and trying to take something that's  
12:03 9 outside the fence and put it in to differentiate what  
12:03 10 the claims call for, what the scope of the property is.

12:03 11 A second source of evidence that -- or a  
12:04 12 second source that you need to consider when you're  
12:04 13 looking at this language to consider what words matter,  
12:04 14 and that's the Court's claim construction. You're going  
12:04 15 to get a schedule along with your jury instructions that  
12:04 16 lay out the interpretations of the terms.

12:04 17 And nowhere in those interpretations are  
12:04 18 you going to find any reference to flexibility and  
12:04 19 continuity. You need to use the language of the claims,  
12:04 20 and you need to use the Court's instruction, the Court's  
12:04 21 interpretation of those claims that's been given to you.

12:04 22 And none of that matters at all with  
12:04 23 respect to flexibility and continuity.

12:04 24 Now, when it comes to the issue of  
12:04 25 infringement and comparing on an element-by-element

12:04 1 basis, you also need to consider some of the evidence  
12:04 2 that was presented by Dr. Zimmerman.

12:04 3 For instance, things like the -- remember  
12:04 4 the calendar example that Dr. Zimmerman talked about?  
12:05 5 Dr. Zimmerman went ahead and showed an example like  
12:05 6 what's up on the screen there that showed two different  
12:05 7 workspaces, two different desktops.

12:05 8 Now, the Defendants' technical expert made  
12:05 9 a big deal to say, look, it's really just one object;  
12:05 10 there's just a series of switches that things turn on  
12:05 11 and off; things don't really change.

12:05 12 If they don't really change, how is it  
12:05 13 that you can go ahead and have one item, one window, one  
12:05 14 calendar tool like this in two different workspaces and  
12:05 15 change the location of the workspace and have it go  
12:05 16 ahead and record the same data; for instance, that  
12:05 17 you're taking your son from school or to practice.

12:05 18 Go ahead and compare that. Compare that  
12:05 19 versus what's shown in the patent. And you'll see  
12:05 20 there's a one-to-one correlation with what Dr. Henderson  
12:05 21 invented and what's called for in the claims of the  
12:05 22 patent.

12:06 23 At the end, when you go ahead and look at  
12:06 24 all the evidence, all the notes -- because I've seen you  
12:06 25 taking a lot of notes -- there's that balancing process.

12:06 1 Slide 51.

12:06 2 Consider their arguments, consider their  
12:06 3 evidence. I'm not saying don't do it. What does it  
12:06 4 boil down to?

12:06 5 They say no displays. They say no  
12:06 6 flexibility. They say no continuity.

12:06 7 What's the evidence that goes ahead and  
12:06 8 supports that there is infringement?

12:06 9 We know that openSUSE and Fedora is used  
12:06 10 on desktops. You heard testimony from Mr. Gray that the  
12:06 11 only example he could ever name where something was --  
12:06 12 where something in Fedora was used on a server -- in  
12:06 13 other words, something related to their no display  
12:06 14 argument -- that that was an experiment that he  
12:06 15 conducted at home.

12:06 16 Those are not products which are used with  
12:06 17 servers. They're used with desktops.

12:07 18 You've seen the examples of customer use.  
12:07 19 You've seen direct testimony from both Defendants. And  
12:07 20 most important of all, you've seen the claim language,  
12:07 21 and you've seen the Court's claim construction. You're  
12:07 22 going to get to study it in more detail. And you see  
12:07 23 how there is a disconnect, a fundamental difference  
12:07 24 between the terms that they're relying upon to show that  
12:07 25 they don't infringe versus what the actual boundaries of

12:07 1 what the property is.

12:07 2 As a result, you're going to see, at least  
12:07 3 under the preponderance of the evidence standard, at  
12:07 4 least under that 50-yard line plus just a touch, that  
12:07 5 that evidentiary standard has been met by the  
12:07 6 Plaintiffs, that there's infringement.

12:07 7 Now, that brings us to our second issue.

12:07 8 If you'd go to Slide 52, Inventorship.

12:07 9 Inventorship comes up just once, one  
12:07 10 question. That's Question 17 on your verdict form. And  
12:08 11 the issue in this case is one for which the Defendants  
12:08 12 bear the burden of proof. They bear the burden of proof  
12:08 13 by clear and convincing evidence, because it's presumed  
12:08 14 that Xerox named the correct inventors when they filed  
12:08 15 for their patent application.

12:08 16 Think about this for a second. If we had  
12:08 17 gone ahead -- let's imagine some alternative universe  
12:08 18 where you had filed the same invention with just one  
12:08 19 inventor or just two inventors, all of them from the  
12:08 20 same company; it's all Xerox PARC's property.

12:08 21 What do you think the Defendants would be  
12:08 22 saying?

12:08 23 They'd saying you left an inventor out;  
12:08 24 you screwed up.

12:08 25 The evidence is that all three of the

12:08 1 inventors came up with this invention. The evidence is  
12:08 2 all three of the inventors talked to one another. And  
12:08 3 the evidence is that they worked together.

12:08 4 You saw Mr. Maxwell talking about the  
12:08 5 merging of the process, and you heard live from  
12:09 6 Dr. Henderson -- by the way, nobody forced him to stay  
12:09 7 down here the whole trial. He's still out there in the  
12:09 8 gallery as a matter of fact, because it's his invention;  
12:09 9 it's his baby. And he worked with the co-inventors.

12:09 10 There was a period of time of three months  
12:09 11 where they talked to each other in the summer of '86;  
12:09 12 then Dr. Henderson and Dr. Card further went ahead and  
12:09 13 came up with additional features.

12:09 14 You remember the catalogue feature that  
12:09 15 Dr. Henderson talked about, that was part of their Rooms  
12:09 16 Project that they came up with in the fall of '86. They  
12:09 17 added to that feature, after they had the benefit of  
12:09 18 talking to Mr. Maxwell.

12:09 19 And then in the beginning of 1987, they  
12:09 20 all worked together further adding features that were  
12:09 21 beyond Rooms and Desk Tops, because remember these  
12:09 22 patents are not limited just to Rooms and Desk Tops.  
12:09 23 They're limited only by what's in the scope of the  
12:09 24 claims.

12:09 25 The examples that are included in there

12:09 1 include Desk Tops and Rooms. But it's not just  
12:09 2 something that's in one commercial product or another.  
12:10 3 There's a lot more to it than what's set forth the  
12:10 4 claims.

12:10 5 And as a result of a three-month period of  
12:10 6 collaboration, they file the patent application that  
12:10 7 resulted in three different patents: The '412 patent,  
12:10 8 which was issued in 1991; the '521 patent, which issued  
12:10 9 in 1995; and the '183 patent, which was issued in 1996.

12:10 10 You don't have to rely just on live  
12:10 11 testimony either to support this Inventorship. Remember  
12:10 12 the articles that Dr. Henderson talked about? July of  
12:10 13 1986, we know that the inventive process had started  
12:10 14 because Dr. Henderson and Dr. Card had created a paper  
12:11 15 to go ahead and describe some of their ongoing work with  
12:11 16 Rooms.

12:11 17 And in that paper, we know that they were  
12:11 18 aware of Mr. Maxwell's work. They commented upon it.  
12:11 19 They were continuing their work and commenting upon the  
12:11 20 work of their co-inventor, Mr. Maxwell. They talked  
12:11 21 about their discussions with Mr. Maxwell. They  
12:11 22 acknowledged that they had talked with him in  
12:11 23 discussions with the Cedar Windows Project.

12:11 24 Now, let's compare that with the jury  
12:11 25 instructions. In the jury instructions, the Judge went

12:11 1 ahead and provided an example of what it means to be  
12:11 2 joint inventors.

12:11 3 Can we you switch over to that briefly?

12:11 4 An example of that kind of effort is  
12:12 5 collaboration or working under common direction, one  
12:12 6 inventor seeing a relevant report and building upon it  
12:12 7 or hearing another's suggestions at a meeting.

12:12 8 And that's exactly what happened back in  
12:12 9 1986.

12:12 10 The third issue that you're going to have  
12:12 11 to decide is the issue of validity. Anticipation. In  
12:12 12 other words, is there one system that discloses each and  
12:12 13 every element of a given claim.

12:12 14 And, again, remember this is something  
12:12 15 that the Defendants bear the burden of proving. They  
12:12 16 bear the burden of proving by a lot more than just this  
12:12 17 51-percent standard that we have. They have to go ahead  
12:12 18 and show clear and convincing evidence.

12:12 19 And the three references that they're  
12:12 20 relying upon are the Amiga system, the Chan system or  
12:12 21 the Chan rooms model, and the Apple Switcher. You've  
12:13 22 heard testimony from their expert, Dr. Wilson, and  
12:13 23 you've heard also testimony from Dr. Zimmerman  
12:13 24 contradicting his conclusions.

12:13 25 You also need to consider, though, a

12:13 1 couple other sources. One person you didn't get to hear  
12:13 2 from today about the relationship between things like  
12:13 3 the Apple Switcher or the Chan rooms model is the Patent  
12:13 4 Examiner.

12:13 5 We know that the Patent Examiner had the  
12:13 6 Switcher in front of them. We know that the Patent  
12:13 7 Office had the Chan rooms model in front of them. More  
12:13 8 importantly, we know that there wasn't any issue about  
12:13 9 confusion, because the inventors had gone ahead and  
12:13 10 sifted through and explained each of those references to  
12:13 11 the Patent Office.

12:13 12 For instance -- switch to Slide 74,  
12:13 13 please.

12:13 14 You saw evidence earlier that there was  
12:14 15 what's called an information disclosure statement.  
12:14 16 There was a need for the inventors and for their  
12:14 17 attorneys to be forthright, to go ahead and disclose  
12:14 18 everything they know to the Patent Office.

12:14 19 They talked about the Macintosh Switcher.  
12:14 20 The Macintosh Switcher was considered and became part of  
12:14 21 the official record of the patent. The same thing with  
12:14 22 respect to the Chan room model.

12:14 23 Now, there's a question at one point in  
12:14 24 terms of distinctions between a workspace and an  
12:14 25 application. And -- which the Court is going to provide

12:14 1 instructions on terms that were construed, but you'll  
12:14 2 read from your instructions that where there's a lack of  
12:14 3 a specific instruction from the Court, you're going to  
12:14 4 go ahead and draw on your experiences.

12:14 5 I think the specific language is: For any  
12:14 6 words in the claim for which I have not provided you  
12:15 7 with a definition, you should apply the plain English  
12:15 8 meaning.

12:15 9 Take a look at what's in these patents.  
12:15 10 Look, for instance, at Figure 1.

12:15 11 Go to Slide 79, please.

12:15 12 There's a perfect example in there.

12:15 13 Workspaces and applications. A workspace is the whole  
12:15 14 screen. The application is something that's as simple  
12:15 15 as those boxes. And what did the patent call those  
12:15 16 boxes?

12:15 17 If you go to the specification, you're  
12:15 18 going to see they talk about them as display objects --  
12:15 19 in this instance, they're called windows -- are provided  
12:15 20 by the same display system object, which calls it a text  
12:15 21 editing application. That's an application.

12:15 22 Now, you go ahead and compare that to the  
12:15 23 Macintosh Switcher. What do they call that? They call  
12:15 24 that --

12:15 25 Switch to 577, please. If you could focus

12:16 1 in on the text.

12:16 2 Remember looking at that in the  
12:16 3 cross-examination of Dr. Wilson? They called that an  
12:16 4 application switcher. It's not a workspace switcher;  
12:16 5 it's an application switcher.

12:16 6 Let's talk about the Amiga reference. The  
12:16 7 Amiga reference --

12:16 8 If you switch to Slide 81, please.

12:16 9 The Amiga reference, this is quoting from  
12:16 10 the exhibit they're relying upon. It's a tool. Again,  
12:16 11 a tool is like an application. It's not a workspace.  
12:16 12 The words that were added by Dr. Wilson to try and show  
12:16 13 that it was a workspace, that was added in. That was  
12:16 14 his characterization, not what the evidence actually  
12:17 15 showed, not what the prior art actually includes.

12:17 16 They haven't met their burden of proof.  
12:17 17 They haven't shown a firm conviction that each and every  
12:17 18 element of these claims is met.

12:17 19 Finally, let's go to the issue of damages.  
12:17 20 The Defendants, I suspect, will spend a lot of time -- a  
12:17 21 lot of your time over the hour-plus focusing on  
12:17 22 something that is frankly not an issue. They're going  
12:17 23 to go ahead and focus as part of the apparent merits of  
12:17 24 the case about how Mr. Cooper, Technology Licensing  
12:17 25 Corporation's representative, is a bad guy.

12:17 1 They lied; that the Judge called them on  
12:17 2 that lie; and that as a result, some of his patents were  
12:17 3 taken away. Again, when you start hearing comments like  
12:17 4 this, you've got to ask yourself, what does this have to  
12:18 5 do with infringement?

12:18 6 What does this have to do with  
12:18 7 Inventorship?

12:18 8 What does this have to do with validity?  
12:18 9 Did Mr. Cooper testify about any of these  
12:18 10 things?

12:18 11 No, no, no.

12:18 12 The one issue that Mr. Cooper testified  
12:18 13 about, besides the ownership of the patents, which is  
12:18 14 not something that we're discussing here today -- it's  
12:18 15 not an issue that you have to decide who owns the  
12:18 16 patents -- is the negotiations that he conducted with  
12:18 17 Apple.

12:18 18 Remember, the one license that TLC and IP  
12:18 19 Innovation got in 2007 was with Apple. In June of 2007,  
12:18 20 they settled an ongoing lawsuit, very shortly after the  
12:18 21 lawsuit was filed. They settled it for \$1.25 million.

12:18 22 Mr. Cooper's testimony was that they were  
12:18 23 sued on Tiger software, which we know is true, because  
12:18 24 that's what's in the complaint. And that one of the  
12:18 25 things that influenced why IP Innovation and TLC took a

12:18 1 license for as low a figure as they did was because of  
12:19 2 the delay with the Leopard software, the upcoming  
12:19 3 Leopard software product.

12:19 4 You know what, whether Mr. Cooper -- even  
12:19 5 if he hadn't told the truth on that, even if you didn't  
12:19 6 believe him, the evidence shows that Apple did come out  
12:19 7 with the Leopard product four months after this feature.  
12:19 8 In other words, that Apple added the concept of virtual  
12:19 9 workspaces with the launch of Leopard in October of  
12:19 10 2007. In other words, they added to the concept  
12:19 11 something that didn't exist before in October of 2007.

12:19 12 This issue of going and looking at prior  
12:19 13 use, prior use of the workspace switcher feature is  
12:19 14 completely unsupported by the evidence. The Defendants  
12:19 15 haven't shown that there was any prior use by Apple of  
12:19 16 the workspace switcher.

12:19 17 And the evidence does show that workspace  
12:19 18 switcher came online with Apple in their Leopard product  
12:20 19 in October 2007, which is exactly the same timeframe of  
12:20 20 the infringement that is the subject of this case here  
12:20 21 today.

12:20 22 Now, there is one point I should bring --  
12:20 23 that we do agree on one thing with Dr. Putnam.  
12:20 24 Dr. Putnam recognized that when it comes to damages, you  
12:20 25 have to adjust for risk, when it comes to settlements.

12:20 1 Settlements recognize that you could lose,  
12:20 2 so you're going to settle for less than what you would  
12:20 3 if you have to go in front of a jury like today. Early  
12:20 4 on, when there were all sorts of risks against Apple,  
12:20 5 TLC and IP Innovation decided to go ahead and take a  
12:20 6 license for \$1.25 million.

12:20 7 Now, there are four licenses that are  
12:20 8 involved in this lawsuit: Silicon Graphics, Central  
12:20 9 Point Data, Hewlett-Packard, and Apple. Three of the  
12:20 10 four licenses were done by Xerox 15 years ago.

12:21 11 Dr. Putnam is relying upon a lump-sum  
12:21 12 license for \$95,000. What do we know about that?

12:21 13 We know that Silicon Graphics offered to  
12:21 14 go ahead and take the feature out of their product. And  
12:21 15 we know that back then, when that license was done in  
12:21 16 1994, two of the three patents that we're talking about  
12:21 17 today weren't even issued. There weren't even property  
12:21 18 rights on the '521 and '183 patents. There was only one  
12:21 19 issued patent as of that date.

12:21 20 The important thing is, is that we have no  
12:21 21 idea of the use. Everybody admits we have no idea how  
12:21 22 much the Silicon Graphics agreement was used. All we  
12:21 23 know is the lump sum that was paid. We know the lump  
12:21 24 sum that was paid, 95,000 back then, and we know the  
12:21 25 lump sum that was paid by Apple, \$1.25 million, last

12:21 1 year -- excuse me -- three years ago.

12:21 2                   Which one do you think the Defendants want  
12:21 3 you to rely upon?

12:21 4                   We think a much more fair metric is how  
12:21 5 much use there is, how many copies were downloaded.

12:22 6                   Now, there's been a lot of testimony about  
12:22 7 use and how IP addresses don't relate to the number of  
12:22 8 users. Again, let's look at the evidence, the  
12:22 9 statements that Red Hat's employees have made to the  
12:22 10 public about the number of users.

12:22 11                  Can you put on 283, Slide 91?

12:22 12                  What they're telling the public -- in  
12:22 13 other words, what they're not saying in the courtroom  
12:22 14 here is there is accuracy in metrics. In other words,  
12:22 15 that the number of units in the field are higher than  
12:22 16 the number of units that are shown on that page.

12:22 17                  In other words, that for Mr. Gemini to  
12:22 18 rely upon those figures, those totals, is a low -- is  
12:22 19 actually lower than the actual number of units in the  
12:22 20 field.

12:22 21                  We also know that the same gentleman that  
12:22 22 went ahead and created this entry went ahead and told  
12:23 23 the public that the number of users was 9.5 million  
12:23 24 users of the Fedora 7, 8, and 9, and another 2.5 million  
12:23 25 users of the proprietary RHEL product.

12:23 1 Now, the other key point that you need to  
12:23 2 consider is the disconnect between what the Defendants  
12:23 3 did with their infringing software once they were sued  
12:23 4 versus what Silicon Graphics did when Xerox came  
12:23 5 knocking on their door.

12:23 6 Silicon Graphics said, you know what, we  
12:23 7 don't need this feature. We're willing to take it out.

12:23 8 You also heard testimony from Mr. Riveros  
12:23 9 yesterday. He was asked the following question. He was  
12:23 10 asked whether or not there was any way to eliminate this  
12:23 11 feature or disable it. He said it could be done; it was  
12:24 12 possible, but it's not something we would do, because,  
12:24 13 first of all, it's a huge hassle. We would basically  
12:24 14 have to redo the whole package.

12:24 15 You need to consider at the end of the day  
12:24 16 that there's a choice -- there is a result of that  
12:24 17 choice. There is a result of their conduct in choosing  
12:24 18 not to eliminate the infringing feature, to take a  
12:24 19 different path from what Silicon Graphics did.

12:24 20 Whether you go ahead and reach a damages  
12:24 21 figure using a reasonable royalty based upon a number of  
12:24 22 units or a lump-sum figure, I think at the end of the  
12:24 23 day, when you consider the evidence that's applicable, I  
12:24 24 think you end up in the same damage figure.

12:24 25 We think you should go ahead and use the

12:24 1 degree of use, because we think that's a more accurate  
12:24 2 metric than simply a lump sum. But that's your choice.

12:24 3 In the end, your choices are to go ahead  
12:24 4 and consider infringement, consider the value of the  
12:24 5 invention of my clients' property, and consider that  
12:24 6 they've taken it, and they haven't paid for it.

12:25 7 Thank you.

12:25 8 And I apologize. I went five minutes  
12:25 9 over, I'm told by co-counsel, so I did 45 minutes  
12:25 10 instead of 40, but part of that was just getting set up  
12:25 11 here.

12:25 12 So thank you for your time.

12:25 13 THE COURT: Let's take a  
12:25 14 five-to-ten-minute break, and then we'll come back in  
12:25 15 here with the Defendant.

12:25 16 (Recess.)

12:25 17 (Jury in.)

18 THE COURT: Please be seated.

12:40 19 Mr. Krevitt.

12:40 20 MR. KREVITT: Thank you, Your Honor.

12:41 21 Ladies and gentlemen of the jury, Josh  
12:41 22 Krevitt. I'm going to now speak to you about Red Hat  
12:41 23 and Novell.

12:41 24 I do want to say at the outset, though,  
12:41 25 that I had had no intention at all of bringing up the

12:41 1 fact Mr. Cooper testified that he had lied to the patent  
12:41 2 office and lied to the Court, and that before I even got  
12:41 3 a question in on cross-examination, it was necessary for  
12:41 4 Judge Rader to give a special instruction that some of  
12:41 5 his testimony was not accurate.

12:41 6 My -- I'm very confident and comfortable  
12:41 7 with your all (sic) recollection with what happened with  
12:41 8 Mr. Cooper's testimony.

12:41 9 I want to focus on the substance, and Mr.  
12:41 10 Gasey's remarks, to my mind, capture all that's wrong  
12:41 11 with this case, all that's wrong with the Plaintiffs'  
12:41 12 presentation.

12:41 13 You saw a lot of scales, you saw some  
12:41 14 magnifying glasses, and you saw an awful lot of checks.  
12:41 15 But what you didn't see is substance. That's what we  
12:41 16 want to focus on, the substance.

12:41 17 The very first words that Mr. Gasey said  
12:42 18 after, good morning, the very first words were, this is  
12:42 19 a clash, a fundamental clash between the open-source  
12:42 20 community on the one hand and patent owners on the other  
12:42 21 hand. This is a fundamental clash of policy  
12:42 22 considerations.

12:42 23 That's not how we see the case. My  
12:42 24 clients have been sued, and they're asking for millions  
12:42 25 of dollars, and there's no merit at all to the case, and

12:42 1 there never has been, not since they wrote the letter  
12:42 2 saying that they wanted us to take 20 days to look at  
12:42 3 the issues, not since they told us to do our own  
12:42 4 evaluation, not since they said, we don't want a  
12:42 5 lawsuit, and went ahead and filed the lawsuit the very  
12:42 6 next day.

12:42 7 There's no merit to the lawsuit, and I'm  
12:42 8 going to walk you through that, and I think it will be  
12:42 9 clear. It's not our burden. You've seen a lot about  
12:42 10 scales. The Plaintiffs like to talk about scales, and  
12:42 11 you know it's not our burden to prove noninfringement.  
12:42 12 We don't have to do anything. But the Plaintiffs do.

12:42 13 The Plaintiffs talk a lot about football  
12:42 14 lines. And we just have to -- I think Mr. Gasey put it,  
12:42 15 50 percent plus a tiny little bit, because they want --  
12:43 16 they want -- they want to lower what they need to show  
12:43 17 to prove infringement because they can't prove  
12:43 18 infringement.

12:43 19 It's their burden. They have to come  
12:43 20 forward. And it's true, you can think about it as  
12:43 21 scales, but when they put nothing at all in front of the  
12:43 22 scales, they don't win, they haven't met their burden.  
12:43 23 Putting checkmarks in a scale is not proving your  
12:43 24 burden. Putting a magnifying glass up on a screen, it's  
12:43 25 just not meeting your burden.

12:43 1                   Looking at the claims, looking at the  
12:43 2 language, our products, that's meeting your burden, and  
12:43 3 that hasn't happened in this case, and we're going to  
12:43 4 talk about it.

12:43 5                   I just -- I want to say at the outset,  
12:43 6 though, about how we got here and what we think this  
12:43 7 case is about. What we think this case is about and  
12:43 8 what the evidence has already shown and what I hope is  
12:43 9 clear to you-all is that IPI and TLC were given patents  
12:43 10 by Xerox. Those companies exist, this is in the record,  
12:43 11 to get money for patents they acquire by suing folks.

12:43 12                  So IPI and TLC went ahead and sued some  
12:44 13 people, and as part of that settlement, they were given  
12:44 14 these patents.

12:44 15                  You remember during Mr. Cooper's testimony  
12:44 16 he said several times, and Mr. Gasey kept using this  
12:44 17 language, that they bought the patents, IPI and TLC  
12:44 18 bought the patents. Remember that? They didn't buy the  
12:44 19 patents. They didn't pay any money for the patents.  
12:44 20 They brought a lawsuit, and as part of that settlement,  
12:44 21 they were given the patents.

12:44 22                  Remember I showed you the agreement, and  
12:44 23 Mr. Gasey objected to you seeing the agreement. I  
12:44 24 showed the agreement in which Xerox gave the patents  
12:44 25 away. How do you have a case where you represent to the

12:44 1 jury that somebody bought patents without showing the  
12:44 2 agreement that gave them the patents in the first place?  
12:44 3 That's the Plaintiffs' case.

12:44 4 Because what happened here is IPI and TLC,  
12:44 5 when they sue people, they expect them to roll over, to  
12:44 6 pay some money, to go away. That's the game plan.  
12:44 7 That's the program.

12:44 8 Remember Mr. Cooper testified about the  
12:45 9 TLC licensing programs for these patents? It was -- it  
12:45 10 was a question I asked him. He said first thing we did  
12:45 11 is we had a licensing program when we got the patents.  
12:45 12 We -- we developed a licensing program.

12:45 13 The licensing program was suing three  
12:45 14 companies, waiting three years, and filing three  
12:45 15 lawsuits. Welcome to the TLC licensing program.  
12:45 16 You-all are a part of it. That's what's going on here.

12:45 17 And why didn't my clients roll over? Why  
12:45 18 is it Michael Tiemann from a Red Hat has been here all  
12:45 19 week and Markus Rex from Novell and Justin Steinman with  
12:45 20 premature twins flying down? Why didn't we?

12:45 21 Mr. Vickrey asked Dr. Putnam today, how  
12:45 22 can it be that your clients, that your clients would  
12:45 23 pursue this case when they're paying you more money than  
12:45 24 it would cost to make us go away, just to pay us off?  
12:45 25 How could that possibly be? Because it's wrong.

12:45 1                   When somebody sues you and there's no  
12:45 2 basis to the lawsuit at all, it's wrong. You don't pay  
12:45 3 to make them go away, because what you don't want to  
12:46 4 fuel, you don't want to fund that litigation machine.  
12:46 5 It's going to steamroll over someone else and it's going  
12:46 6 to steamroll over you another time. It's wrong.

12:46 7                   So what did my clients do? They said, no,  
12:46 8 we're not going to pay to make IPI and TLC go away. No,  
12:46 9 we're not. We're not going to give them money just  
12:46 10 because it would be easier. We are going to take this  
12:46 11 case and we are going to submit this case to 11,  
12:46 12 originally 12, 11 strangers in Marshall, Texas. That's  
12:46 13 how comfortable we are in the merits. That's how  
12:46 14 comfortable we are that when the evidence comes out, the  
12:46 15 jury will agree with us.

12:46 16                  And one thing I can assure you right from  
12:46 17 the start every day in every way, we tried to make this  
12:46 18 clear for you-all. And I'm certain we didn't always  
12:46 19 succeed, but that was our goal. Every single day when  
12:46 20 we went to bed, how can we make this clear for the jury?  
12:46 21 How can we explain this evidence? How can they  
12:46 22 understand what the patent means? Because when you do,  
12:46 23 as I said at the outset, when you understand what the  
12:47 24 patents actually cover and what our products actually  
12:47 25 do, we don't infringe.

12:47 1 So very quickly, let's talk about what  
12:47 2 evidence the Plaintiffs put on about our products. Did  
12:47 3 you see a demo of our products? You heard a lot of  
12:47 4 testimony that you could download it for free. You can  
12:47 5 go on the lunch break and download it -- not until  
12:47 6 you're done with your deliberations. But after, you can  
12:47 7 go and download it for free. It's available.

12:47 8 They had no problem showing you Microsoft  
12:47 9 Windows the other day when Mr. Hill was cross examining  
12:47 10 Dr. Wilson. I think that was yesterday. It seems like  
12:47 11 forever ago. They had no problem doing a demonstration.

12:47 12 Isn't it strange to you that somebody  
12:47 13 would accuse somebody of infringement and ask you-all to  
12:47 14 award millions of dollars and not show the product?  
12:47 15 Doesn't that seem a little weird to you? The reason  
12:47 16 they didn't show the product is because we don't  
12:47 17 infringe.

12:47 18 What else did they do? At the outset, I  
12:47 19 explained to you that what the patent was about is  
12:47 20 flexibility and continuity. Remember that? Flexibility  
12:47 21 and continuity. And I explained why. I didn't ask you  
12:48 22 to take my word for it. I walked through the figures,  
12:48 23 right, and Mr. Gray did the same thing, and Dr. Wilson  
12:48 24 did the same thing.

12:48 25 And so what is the response you've heard.

12:48 1 The Plaintiffs know that our products can't do  
12:48 2 flexibility and continuity. They know that. No dispute  
12:48 3 about that. Mr. Gasey didn't tell you otherwise. Our  
12:48 4 products can't do it. So what do they do? They've got  
12:48 5 to get rid of that. Flexibility and continuity won't  
12:48 6 work. They've got to get rid of that.

12:48 7 So the way they do that is slight of hand.  
12:48 8 They tell you, are those words in the claims? Are those  
12:48 9 exact words in the claims? That's what they do. Even  
12:48 10 though Dr. Henderson, the inventor of the patents who  
12:48 11 came here and testified, who is still here, as Mr. Gasey  
12:48 12 pointed out, testified using exactly those words. So  
12:48 13 Dr. -- it's good enough for Dr. Henderson to understand  
12:48 14 his own invention, it's good enough for  
12:48 15 Dr. Henderson to explain it to the jury. But when  
12:48 16 you-all go back to the jury room and you try to sort  
12:49 17 this out, the only words you can use, and I challenge  
12:49 18 you to do this for three minutes, the only words you can  
12:49 19 use are the words in the claims.

12:49 20 I want you to have a conversation about  
12:49 21 display system objects and display objects and whether  
12:49 22 or not data structures are common. It's -- the reason  
12:49 23 people use words is the same reason Judge Rader, the  
12:49 24 Court, construes the claims. It's so that people in  
12:49 25 your position can understand what the claims mean. It's

12:49 1 about clarity.

12:49 2 We are the party of clarity. We are the  
12:49 3 party that wants you to understand. We want to make it  
12:49 4 clear because clarity is our friend. We win with  
12:49 5 clarity. The Plaintiffs are the party of confusion, of  
12:49 6 distraction.

12:49 7 So even though Mr. Henderson --

12:49 8 Dr. Henderson, excuse me, used exactly those words, they  
12:49 9 were good enough for him, they're not good enough for  
12:49 10 you. But here's an interesting thing, not a single  
12:49 11 witness that testified over four days, not one said that  
12:49 12 flexibility and continuity does not accurately describe  
12:49 13 the patents. Think about that.

12:50 14 Dr. Zimmerman was here, the Plaintiffs'  
12:50 15 expert. He was asked one question about this. One  
12:50 16 question, the very first question of his examination.  
12:50 17 Is that accessible? No. Take my work for it, the one  
12:50 18 question he was asked is the one question you were told.  
12:50 19 Are those words -- and you hear -- you heard the  
12:50 20 Defendants' lawyer, right out of the box, Mr. Krevitt,  
12:50 21 talk about flexibility and continuity, correct? Yes, I  
12:50 22 did. Are those words anywhere in the claims of  
12:50 23 Dr. Henderson's patents? No, they not.

12:50 24 Well, he needn't have asked that question.  
12:50 25 We know that. But did he ask the next question? Are

12:50 1 they inaccurate? In any way, do you disagree with that  
12:50 2 characterization? It's his own expert. Do you think  
12:50 3 that's not an appropriate way to characterize the  
12:50 4 patents? He didn't ask the question. He didn't ask the  
12:50 5 question because we know the answer. Dr. Henderson gave  
12:50 6 the answer. The answer is flexibility and continuity  
12:50 7 are accurate.

12:50 8 Don't you ask your own expert, if the  
12:50 9 answer is no, wouldn't that be helpful? Wouldn't it be  
12:51 10 nice for Mr. Gasey to have been able to stand up here  
12:51 11 and say, and as Dr. Zimmerman said, flexibility and  
12:51 12 continuity is inaccurate.

12:51 13 You don't ask a question -- this is basic  
12:51 14 101 stuff, when you know the answer is a bad one. So he  
12:51 15 didn't ask Dr. Zimmerman.

12:51 16 Dr. Wilson testified that flexibility and  
12:51 17 continuity accurately describes the patents.

12:51 18 Dr. Gray testified to flexibility and continuity  
12:51 19 accurately describes the patents. Dr. Henderson  
12:51 20 described that flexibility and continuity accurately  
12:51 21 described the patents. And Dr. Zimmerman said, the  
12:51 22 words aren't in the claims. That's all you got. Every  
12:51 23 witness consistent, flexibility and continuity.

12:51 24 But I want you to understand something  
12:51 25 else. That's not the reason that we're saying we don't

12:51 1 infringe, meaning we're not -- it's not that we are not  
12:51 2 relying on the claim language. I want you to understand  
12:51 3 that. We are relying on the claim language. So I will  
12:51 4 walk you through a claim. I will do, with respect to  
12:52 5 infringement, what the Plaintiffs didn't. And I will  
12:52 6 explain to you where those concepts come from and why it  
12:52 7 is that we do not have those in our product.

12:52 8 So Claim 1 says: A first display object  
12:52 9 and a second display object. Do you see those? And it  
12:52 10 goes on to require that those are in different sets of  
12:52 11 workspaces, that the first display object, A, B, C, D  
12:52 12 can be located one place and the second display object  
12:52 13 in a different place. And you've seen this figure an  
12:52 14 awful lot, right? And you see right out of the  
12:52 15 specification that they can be presented in different  
12:52 16 locations on the screen and with different dimensions.  
12:52 17 That's the flexibility. That's all we're talking about.

12:52 18 But when you're in the jury room, focus on  
12:52 19 the claim language. We're not telling you flexibility  
12:52 20 is in the claim. We could have eliminated that  
12:52 21 confusion a long time ago. That word is not in the  
12:52 22 claim. That concept is required by the claims. Dr.  
12:52 23 Henderson told you that.

12:52 24 Now, let's move on, and we look at  
12:52 25 continuity. The claims require that they be perceived

12:53 1 the same, that you can continue your work. You look  
12:53 2 right in the specification. It maintains continuity.  
12:53 3 Next line in the specification. You continue your  
12:53 4 working. You perceive these things as the same tool so  
12:53 5 you can continue your work. That was the invention.  
12:53 6 The title of the invention is shared display objects,  
12:53 7 display system objects. Excuse me.

12:53 8 What that means is you have two display  
12:53 9 objects in two workspaces. But so that you can have the  
12:53 10 flexibility to arrange them any way you want and the  
12:53 11 continuity to continue your work, they share the same  
12:53 12 data structure. They share -- they come from the same  
12:53 13 place. That's the title of the patent. They share a  
12:53 14 system object. And by sharing the system object, what  
12:53 15 that means is, but not being the same, it means they can  
12:53 16 be arranged differently. That's the flexibility right  
12:53 17 out of the claims in terms of talking about the first  
12:53 18 display object and the second and different sets, and  
12:53 19 also you can continue your work.

12:53 20 Dr. Henderson told you that, you heard  
12:54 21 deposition testimony from other inventors to that  
12:54 22 effect, and it's right out of the claim language. So I  
12:54 23 want to make sure you understand that this is a red  
12:54 24 herring that flexibility and continuity are not in the  
12:54 25 claims.

12:54 1 Now, let's move on and talk about  
12:54 2 infringement quickly. The first thing I want to talk  
12:54 3 about is direct infringement. These are concepts that  
12:54 4 are not concepts with which you deal with every day, I  
12:54 5 assume, and they are -- they are tough concepts for us  
12:54 6 to keep straight. So I want to make sure you understand  
12:54 7 that there are two theories on which the Plaintiffs are  
12:54 8 seeking damages under infringement.

12:54 9 The first is what's called direct  
12:54 10 infringement. What that means is that we infringe,  
12:54 11 meaning Red Hat and Novell do all the things in the  
12:54 12 claim. One actor, Red Hat, or one actor, Novell, does  
12:54 13 all the things in the claim. All the claims require a  
12:54 14 display. Remember that? So the only way we can be a  
12:54 15 direct infringer -- there is no dispute on this  
12:54 16 question -- the only way we can be a direct infringer is  
12:55 17 for our internal use. Direct infringement is just when  
12:55 18 -- when Michael Tiemann at Red Hat or Markus Rex at  
12:55 19 Novell are using the computers themselves, when Red Hat  
12:55 20 and Novell are using the computers themselves. That's  
12:55 21 very important. That's direct infringement.

12:55 22 And the reason it's important is it's  
12:55 23 another red herring. The Plaintiffs don't want you to  
12:55 24 find direct infringement, or stated differently, they  
12:55 25 don't care about that. Red Hat has some 3,200

12:55 1 employees. I think Novell has 3,900 worldwide. Let's  
12:55 2 round both up to 4,000. They have 4,000 employees.  
12:55 3 They're asking for 62 cents a copy.  
12:55 4 That's \$2,400. If you find direct infringement because  
12:55 5 the only direct infringement can be the use by my  
12:55 6 clients, the use of the employees of my clients, direct  
12:55 7 infringement results in damages of 24, 25, 2,000,  
12:55 8 hundred dollars. I want to make sure that's clear.  
12:55 9 That's direct infringement. Use by my clients  
12:56 10 internally.

12:56 11 So what's inducement? That's what the  
12:56 12 case is about. Inducement is that my clients sell  
12:56 13 software, and it causes other people to infringe. It  
12:56 14 causes you to infringe or some company to infringe.  
12:56 15 That's inducement. It induces, it causes you to  
12:56 16 infringe.

12:56 17 Now, here is the important thing. There  
12:56 18 is no evidence, no evidence in this record -- and I  
12:56 19 welcome Mr. Hill on his rebuttal to point to a single  
12:56 20 shred of evidence on the following point. That even a  
12:56 21 single customer, even one, has ever used the server  
12:56 22 software with a display running Linux, running Red Hat  
12:56 23 software, or running Novell software.

12:56 24 So let me make sure you understand what  
12:56 25 I'm saying because it's very important.

12:56 1 They can only prove inducement -- can we  
12:56 2 pull up the jury instructions on inducement? They can  
12:57 3 only prove inducement, this is what Judge Rader told  
12:57 4 you, they can only prove inducement if they have these  
12:57 5 five things.

12:57 6 So the first is Defendants took actions  
12:57 7 that caused somebody to infringe. Let's leave that  
12:57 8 aside. Let's give them the benefit of the doubt on that  
12:57 9 one. We think they're wrong, but for the moment we'll  
12:57 10 give them the benefit of the doubt. By providing  
12:57 11 software or Mr. Gasey talked about literature, we're  
12:57 12 causing people to do -- to use our software. Let's  
12:57 13 leave that one aside.

12:57 14 The next is that they encouraged acts, so  
12:57 15 what that means is our customers' use, we're encouraging  
12:57 16 our customers to do something, our customers' use  
12:57 17 infringes.

12:57 18 Now, we proved, I hope, even though it's  
12:57 19 not our burden, that nobody infringes. That's the  
12:57 20 flexibility and continuity we talked about, that nobody  
12:57 21 infringes. Hopefully we proved that. But even if you  
12:57 22 accept the encouraged acts constituted direct  
12:57 23 infringement -- let's move to the next thing --  
12:57 24 Defendants were aware of the patent and knew or should  
12:57 25 have known that the acts constitute infringement.

12:58 1 Let's make sure we understand what that  
12:58 2 means. You cannot find inducement unless you find that  
12:58 3 we knew there was infringement, unless you find that my  
12:58 4 clients not only caused the customer to use the  
12:58 5 software, but knew that when the customer used the  
12:58 6 software, it would be infringing.

12:58 7 So if my clients believed that there was  
12:58 8 no infringement, if my clients believed genuinely that  
12:58 9 the software does not infringe, you cannot find  
12:58 10 inducement. That's what this means. You must find, to  
12:58 11 find inducement, the Plaintiffs must prove that my  
12:58 12 clients knew that the acts of our customers would  
12:58 13 infringe.

12:58 14 Michael Tiemann testified unequivocally,  
12:58 15 Red Hat does not believe there's infringement. Red Hat  
12:58 16 does not believe there's infringement. He had an  
12:58 17 opportunity -- he was cross examined very aggressively  
12:59 18 and ably by Mr. Hill, nothing on this question.

12:59 19 Markus Rex, same thing, does Novell  
12:59 20 infringe? No, we don't. Has it been Novell's belief  
12:59 21 that it doesn't infringe throughout this case? Yes, it  
12:59 22 has been.

12:59 23 If they -- if you believe their testimony,  
12:59 24 if you do not believe that Markus Rex and Michael  
12:59 25 Tiemann lied when they testified under oath, there can

12:59 1 be no inducement under the instructions that Judge Rader  
12:59 2 gave you.

12:59 3 There's another reason there can be no  
12:59 4 inducements, and I'm sorry for spending so much time,  
12:59 5 but this is the substance that I was talking about.  
12:59 6 This is what you have to look at.

12:59 7 The other reason there can be no  
12:59 8 inducement is this: The Plaintiffs must prove that  
12:59 9 somebody actually did it, that somebody used our server  
12:59 10 software with a display running our software. The  
12:59 11 Plaintiffs must prove that someone did it.

12:59 12 It's not enough for Mr. Gasey to say --  
12:59 13 and I wrote it down -- it's not enough for Mr. Gasey to  
01:00 14 say: Who do you think put the material on the servers?  
01:00 15 I don't know who put the materials on the servers.  
01:00 16 They're suing my clients for millions of dollars. Who  
01:00 17 do you think put the materials on the servers isn't good  
01:00 18 enough. They need evidence. They need evidence that  
01:00 19 somebody did it.

01:00 20 Mr. Hill will not be able to stand up here  
01:00 21 and identify a single customer for which there is  
01:00 22 evidence in the record that uses either of my clients'  
01:00 23 server software with a display that runs Red Hat or  
01:00 24 Novell's software. If he does, it will be the first  
01:00 25 time we hear it. There is no evidence in the record of

01:00 1 somebody doing that.

01:00 2 It may seem like a technicality. He's  
01:00 3 going to stand up and talk about all our customers.  
01:00 4 Mr. Krevitt bragged time and again. We do. We have  
01:00 5 lots of customers, lots of customers, the White House,  
01:00 6 Department of Defense, Justice Department, NASA, lots of  
01:00 7 big companies, too. That's not enough.

01:01 8 The Plaintiffs had the burden to come  
01:01 9 forward with evidence that somebody did it. And they  
01:01 10 had to come forward with the evidence of who did it and  
01:01 11 prove that to you. And that -- the record is completely  
01:01 12 absent of any such evidence. The issue was simply not  
01:01 13 addressed at any time in this case.

01:01 14 So now let's talk about the two examples  
01:01 15 that Dr. Zimmerman gave for infringement. He gave one  
01:01 16 example of a trash icon, I believe, and one example of  
01:01 17 the calendar. I want to note something, for what it's  
01:01 18 worth, Mr. Gasey said that Mr. -- that Dr. Zimmerman had  
01:01 19 been shown something that wasn't right. I assume it was  
01:01 20 not deliberate.

01:01 21 The demonstrative that Mr. Gasey put on  
01:01 22 the screen was used to cross-examine Mr. Gray.  
01:01 23 Dr. Zimmerman was never shown that demonstrative,  
01:01 24 because had Dr. Zimmerman been shown that demonstrative,  
01:02 25 Mr. Lyon would have cross-examined him and demonstrated

01:02 1 that his opinions were wrong. So the demonstrative --  
01:02 2 demonstrate wasn't shown to Dr. Zimmerman. It was only  
01:02 3 shown on cross-examination to our witness.

01:02 4 And a funny thing about that. You know  
01:02 5 I'm being tag-teamed today by Mr. Hill and Mr. Gasey.  
01:02 6 Mr. Hill is going to stand up and speak yet. And that's  
01:02 7 how it works. The Plaintiffs go first. They get to put  
01:02 8 on their evidence. We've got to sit there and wait, and  
01:02 9 then we get to go. We put on our evidence. And then  
01:02 10 the Plaintiffs get another shot. They get to come back  
01:02 11 up and put on their evidence. And that's how it happens  
01:02 12 at trial, too.

01:02 13 It didn't in this case, but that's how it  
01:02 14 happens in trial, also. Keep this in mind.

01:02 15 Dr. Zimmerman, who's still here with us,  
01:02 16 could have testified in response to Mr. Gray's testimony  
01:02 17 and could have explained why that was wrong. He could  
01:02 18 have testified in response to Dr. Wilson's  
01:02 19 demonstrations and explained why those are wrong.

01:02 20 The Plaintiffs could have put him up  
01:02 21 and -- asked Dr. Zimmerman, why was Dr. Wilson's  
01:03 22 demonstrations wrong? What was wrong with those? Walk  
01:03 23 us through that. Where did -- where did Dr. Wilson go  
01:03 24 wrong? Why should the jury not believe their own eyes  
01:03 25 when they watched the demonstration that proved that

01:03 1 these patents are invalid. But they didn't put him on,  
01:03 2 and they didn't put him on for the same reason they  
01:03 3 didn't ask him the question about flexibility and  
01:03 4 continuity.

01:03 5 It's not helpful. You don't put a witness  
01:03 6 on who's going to say things that aren't helpful.  
01:03 7 Mr. Gemini, too -- keep this in mind. Mr. Gemini  
01:03 8 testified, and then Dr. Putnam testified. One of the  
01:03 9 things Mr. Gemini also testified is: I don't have all  
01:03 10 the information I need. Mr. Tiemann has some of it.

01:03 11 So then Mr. Tiemann testified. Remember  
01:03 12 that? And Mr. Gemini was here when that happened. And  
01:03 13 then what happened? I haven't seen Mr. Gemini since. I  
01:03 14 don't know if he left town or just left the courthouse.  
01:03 15 He -- he has not been around since. He could have  
01:03 16 testified in response to what Mr. Tiemann said at any  
01:04 17 time. He could have testified in response to what  
01:04 18 Dr. Putnam said at any time. They chose not to put him  
01:04 19 on.

01:04 20 Now, the two issues that were raised  
01:04 21 here -- I want to make sure you understand. There is a  
01:04 22 trash icon -- there are two kinds of windows -- forgive  
01:04 23 me, I know you've heard so much about this, but there  
01:04 24 are sticky windows and there are ordinary windows. On  
01:04 25 that, there's no question, two kinds of windows, sticky,

01:04 1 ordinary.

01:04 2                   The sticky windows, which -- of which this  
01:04 3 is one, are one single display object. That's claim  
01:04 4 language. I didn't say flexibility. That's claim  
01:04 5 language. There is only one display object. It's  
01:04 6 slapped on. It doesn't move. You go from workspace to  
01:04 7 workspace. It is the same display object. It doesn't  
01:04 8 share a display on -- system object with another display  
01:04 9 object. It doesn't do the things that the claims  
01:04 10 require, the claims require. It also has no  
01:04 11 flexibility. That doesn't infringe.

01:04 12                   The only other example was this, the  
01:05 13 calendar. Now, the way our calendars work, and  
01:05 14 Mr. Gray explained this, and I know this is technical,  
01:05 15 and I -- and I'm doing the Plaintiffs' job. They're the  
01:05 16 ones that should be explaining why this falls in the  
01:05 17 scope of the claims. So I'm up here trying to explain  
01:05 18 to you why they can't do that.

01:05 19                   The way our calendar works, as you see  
01:05 20 here, is you have one system object or data structure.  
01:05 21 That's what generates that calendar, that's what  
01:05 22 generates it, and you have another. The patent should  
01:05 23 have done this. The patents share this. That's what  
01:05 24 the patent title is about, sharing a system object.

01:05 25                   In the patents, this and that would be

01:05 1 one. And that's what I was trying to do with my hands  
01:05 2 earlier. Those two connect up to two different display  
01:05 3 objects, but they control two different display objects.  
01:05 4 And that's why you have continuity, because when you  
01:05 5 share the display object, the data that you do to this  
01:05 6 display object goes down to the system object and is  
01:06 7 reflected in the other display object. So  
01:06 8 that -- that does not -- that's the title. Thank you.

01:06 9 User interface with multiple work --  
01:06 10 workspaces for sharing displace system objects, for  
01:06 11 sharing display system objects. And if you go back,  
01:06 12 these are not shared. That's right out of the claim.  
01:06 13 When you-all go back, you can look at the claims.  
01:06 14 That's in the claims. That's claim language, and we  
01:06 15 don't infringe.

01:06 16 So on infringement, here's what  
01:06 17 Dr. Zimmerman did. Dr. Zimmerman testified.  
01:06 18 Mr. Gibbons stood here and said: So, Dr. Zimmerman, I'm  
01:06 19 going to read you a claim element. He read a claim  
01:06 20 element, and he said, is that claim element met? Yep.

01:06 21 And then Mr. Gasey stood up, you remember  
01:06 22 that, and he went over and he -- he checked some things  
01:06 23 on the board, that was the infringement analysis.  
01:06 24 That's not meeting your burden. That's not enough.  
01:06 25 That's an empty scale. So when they tell you about the

01:06 1 tiny amount, that's not enough. We don't infringe, and  
01:06 2 we have presented evidence to that effect.

01:07 3 And we just put up on the screen, because  
01:07 4 everyone likes graphics, when you get to the jury  
01:07 5 question. This is what I want you to keep in mind, this  
01:07 6 is both direct infringement, of course, and inducement,  
01:07 7 because both require infringement. We don't do the  
01:07 8 second and the third claim elements for sticky windows,  
01:07 9 and for ordinary windows, we also don't do the second  
01:07 10 and third claim elements. We are missing those  
01:07 11 elements.

01:07 12 And as you know, as you've heard many  
01:07 13 times, you miss one element, there's no infringement.  
01:07 14 You miss two, three, doesn't matter. There's no  
01:07 15 infringement. We are missing many elements. The  
01:07 16 Plaintiffs have not proven infringement, and while we  
01:07 17 didn't have to, we have proven no infringement.

01:07 18 Now, let's talk quickly about validity.  
01:07 19 The -- I want to do the Inventorship issue first. I'm  
01:07 20 going to try to make this one quick, okay?

01:07 21 Okay. So the Inventorship issue. There's  
01:08 22 three inventors. You-all have heard that. There's John  
01:08 23 Maxwell, on the one hand, and there's Card and Henderson  
01:08 24 on the other. Dr. Henderson, excuse me. There's Card  
01:08 25 and Dr. Henderson on the other.

01:08 1                   There is no question, no dispute in this  
01:08 2 case that Maxwell worked on one project and Card and  
01:08 3 Henderson worked on another. The only question is at  
01:08 4 some point did they collaborate. There's no dispute,  
01:08 5 you heard it from all the deposition testimony that was  
01:08 6 read, Dr. Henderson was very candid about this, they  
01:08 7 worked on different projects. You got Card and  
01:08 8 Henderson on the one hand. You've got Maxwell on the  
01:08 9 other hand.

01:08 10                  And let's just look quickly -- we'll tick  
01:08 11 through this quickly. What did Card say: What about  
01:08 12 John Maxwell? Did you work with him at all, not  
01:08 13 directly, indirectly? Well, it turned out he had a  
01:08 14 somewhat similar idea. And his work was done  
01:08 15 independent of what you and Dr. Henderson did? More or  
01:08 16 less, yes.

01:08 17                  And I think we have Maxwell who says: Did  
01:08 18 you work with Mr. Henderson or Dr. Card in developing a  
01:09 19 multiple workspace environment? Answer: No. Did you  
01:09 20 work on Rooms at all? Answer: No. Did you -- do you  
01:09 21 consider Rooms -- that was Dr. Henderson and card's  
01:09 22 project -- do you consider Rooms and Desktops, that's  
01:09 23 Maxwell's project -- to be the same thing? No. I mean,  
01:09 24 they are completely invented and implemented completely  
01:09 25 independently of each other.

01:09 1 Hard to imagine, more unequivocal  
01:09 2 testimony. So they invent the ideas separately.

01:09 3 Now, here's what the jury instruction  
01:09 4 says. Again, let's just look at it very quickly. The  
01:09 5 jury instruction, first line out of the jury  
01:09 6 instruction. A joint invention, that's what they have  
01:09 7 to prove -- excuse me -- we have to prove there's not a  
01:09 8 joint invention, but for the patent to be valid, you  
01:09 9 need a joint invention.

01:09 10 A joint invention is the product of  
01:09 11 collaboration of the inventive endeavors, the ideas, the  
01:09 12 ideas behind the invention -- That's what you have to  
01:09 13 collaborate on -- of two or more persons working toward  
01:10 14 the same end and producing an invention by their  
01:10 15 aggregate efforts. You're collaborating on the  
01:10 16 inventive ideas of two or more persons to the same end.  
01:10 17 That didn't happen here.

01:10 18 You saw the testimony of Card, and you saw  
01:10 19 the testimony of Maxwell. Here's what  
01:10 20 Dr. Henderson explained. Dr. Henderson candidly  
01:10 21 admitted that he and Card worked on one project and  
01:10 22 Maxwell worked on another project. And then at some  
01:10 23 point, a patent attorney shows up. At some point, a  
01:10 24 patent attorney gets involved. The patent attorney gets  
01:10 25 involved when there's already been an invention. You

01:10 1 don't just have patent attorneys laying around waiting  
01:10 2 for something to happen. You have an invention, and  
01:10 3 Patent attorneys show up.

01:10 4 And they start talking about the patent  
01:10 5 process. Not coming up with the invention. Patent  
01:10 6 attorneys don't come up with inventions. They  
01:10 7 memorialize those in a patent. And so the patent  
01:10 8 attorney comes around, and Card and Henderson start  
01:10 9 talking with him, and he starts thinking about doing a  
01:10 10 patent and in his research at Xerox discovers the work  
01:11 11 of Maxwell and decides, hey, that's similar. Let's pull  
01:11 12 that together.

01:11 13 If you look at Maxwell, he says: How did  
01:11 14 it come to being that you and Mr. Henderson and  
01:11 15 Dr. Card were put together on this one patent. The  
01:11 16 patent attorney, the very first three words in response  
01:11 17 to that question prove it all. The patent attorney, Jim  
01:11 18 Beran, came to my office, and he said, we found your  
01:11 19 name on some software in the CSL system on a system  
01:11 20 called Desk Tops. Did you write that software? And I  
01:11 21 said, yes. And he said, we'd like to file a patent on  
01:11 22 that. And I said, sounds good to me.

01:11 23 Then they come together, and they do a  
01:11 24 patent. So inventing separately but patenting together  
01:11 25 is not enough. That's not joint Inventorship. And if

01:11 1 you'll indulge me just for a minute because -- so I was  
01:11 2 talking to my daughter, and I was thinking about how to  
01:11 3 explain this. And here's the -- here's how it occurred  
01:11 4 to me.

01:11 5 So in her class, she's in fourth grade,  
01:11 6 Mrs. Smith brought them all together. They all came  
01:12 7 together, and they wrote a story. And Ms. Smith said,  
01:12 8 you'll come up with the characters, and you come up with  
01:12 9 where it will be, and you come up with the story line,  
01:12 10 and you can come up with some crime action fun stuff,  
01:12 11 and we'll all sit around a table, and we'll all write a  
01:12 12 story together. We'll all collaborate on a story.  
01:12 13 We'll have one story that we all collaborate on. All 11  
01:12 14 of you are going to work on a story.

01:12 15 So you sit around a table, and you work  
01:12 16 together, and then Mrs. Smith slaps it together, and now  
01:12 17 you've got Mrs. Smith's fourth grade story. It's one  
01:12 18 story on which you collaborated.

01:12 19 The difference is what happened here.  
01:12 20 What happened here is if Mrs. Smith had said, okay, you  
01:12 21 go out and write a story, and you go out and write a  
01:12 22 story, everyone go write out and write their own story.  
01:12 23 Don't talk to each other and don't collaborate. You all  
01:12 24 go out and write your own stories and come back in a  
01:12 25 week with your stories. And what we'll do, it will be

01:12 1 really cool, we'll slap all those stories together, and  
01:12 2 we'll call those Mrs. Smith's 11 different stories from  
01:12 3 fourth grade, 2010.

01:12 4 That is not collaborating on the stories.

01:12 5 That is not collaborating on the inventive endeavors.

01:13 6 You have to prove that they collaborated on the  
01:13 7 inventions, not the writing of a patent.

01:13 8 They didn't. The evidence is unequivocal.

01:13 9 The evidence is clear and convincing, and you should  
01:13 10 find the patent invalid. There is not a joint  
01:13 11 Inventorship.

01:13 12 So now we'll move on. Let's talk about  
01:13 13 anticipation.

01:13 14 You saw Dr. Wilson demo those machines,  
01:13 15 and he was very excited about those machines, very  
01:13 16 excited about computers, loves his computers. And he  
01:13 17 demoed the Apple machine, and he demoed the Amiga  
01:13 18 machine, and you saw it with your own eyes.

01:13 19 Now, Mr. Gasey told you not to believe  
01:13 20 those eyes, and Mr. Hill will probably echo that, but  
01:13 21 you saw it with your own eyes. Those machines  
01:13 22 invalidated every single thing that the patents do.

01:13 23 And Dr. Wilson didn't just say, take my  
01:13 24 word for it. He didn't do a demo and talk fancy about  
01:13 25 his son, Steve, and then sat down. Mark Lyon brought

01:14 1 him through every single claim element for each one of  
01:14 2 those machines, every single claim element,  
01:14 3 element-by-element-by-element, and they were satisfied.

01:14 4 And so what did you hear today? What is  
01:14 5 the response? What's plaintiffs' response to all of Dr.  
01:14 6 Wilson's evidence? Here it was. With respect to Chan,  
01:14 7 the only thing Mr. Gasey said is that there was another  
01:14 8 article before the patent office. Stipulated, no  
01:14 9 argument. There was another article before the patent  
01:14 10 office. That's true.

01:14 11 There was an article, however, that was  
01:14 12 not before the patent office that provided critical  
01:14 13 details about the Chan system that had it been before  
01:14 14 the patent office, the patent would not have been  
01:14 15 allowed. That's what Dr. Wilson testified. The patent  
01:14 16 would not have been allowed.

01:14 17 The information in the second article was  
01:14 18 so important, was so different and Dr. Wilson explained  
01:14 19 why the patent would not have been allowed.

01:14 20 Now, Mr. Gasey told you, you don't have to  
01:15 21 worry about the article, but Dr. Zimmerman didn't tell  
01:15 22 you that. Dr. Zimmerman could have come and explain why  
01:15 23 the second article was really nothing. It didn't add  
01:15 24 much, not a big deal. That didn't happen. So we have  
01:15 25 to take Mr. Gasey's word for it.

01:15 1 So you have Dr. Wilson telling you it's  
01:15 2 critical, and you have Mr. Gasey telling you it's not a  
01:15 3 big deal.

01:15 4 Next, let's look at -- and that's it on  
01:15 5 that. That's it on Chan. No argument, no argument,  
01:15 6 keep this in mind. This is very important, no argument  
01:15 7 that the Chan system does not disclose every element.  
01:15 8 No argument that the Chan system doesn't invalidate the  
01:15 9 claims as a reference. The only argument is one paper  
01:15 10 was already before the patent office so we should assume  
01:15 11 the patent office knew about it, and then we shouldn't  
01:15 12 worry about it. No harm, no foul.

01:15 13 The second reference, also not -- second  
01:15 14 system, also not before the patent office, which we seem  
01:15 15 to be having technical difficulties, was the Amiga  
01:15 16 Workbench. The Amiga Workbench was also not shown to  
01:16 17 the patent office. And Dr. Wilson testified at length,  
01:16 18 showed the system, worked on the system and explained to  
01:16 19 you on a claim-by-claim basis, Dr. Wilson did for  
01:16 20 invalidity what Dr. Zimmerman did not do for  
01:16 21 infringement.

01:16 22 Dr. Wilson did not just say, take my work  
01:16 23 or word for it. I didn't go over to a whiteboard and  
01:16 24 just do checks. Dr. Wilson walked through item-by-item,  
01:16 25 element-by-element, system-by-system why they are

01:16 1 invalidated. The Amiga Workbench is an example.  
01:16 2 The Apple Macintosh is another example.  
01:16 3 And this -- the Apple Macintosh, to my mind, and  
01:16 4 Mr. Gasey's presentation, with all due respect, is a  
01:16 5 perfect example of the confusion, of the distraction, of  
01:16 6 the red herrings, of the don't look over here when  
01:16 7 Mr. Hill was cross examining Dr. Wilson and could ask  
01:16 8 any questions at all, any questions at all, and devotes  
01:16 9 a large portion of it to bullying the witness about his  
01:17 10 hourly rate, about how many hours he spent on this.

01:17 11 You have Dr. Wilson, one of the leading  
01:17 12 experts and professional computer programmers in the  
01:17 13 world, been in the business for 45 years, he's on the  
01:17 14 stand under oath and telling the Court -- telling the  
01:17 15 jury that the patents are invalid, and you spend your  
01:17 16 time bullying him about his hourly rate.

01:17 17 So what did Mr. Gasey just say about the  
01:17 18 Apple Macintosh? Mr. Gasey -- go back, please.  
01:17 19 Mr. Gasey said that the Apple Macintosh does not  
01:17 20 invalidate -- and it was a big windup -- he said, you've  
01:17 21 got to look at the words of the claim. You've got to  
01:17 22 focus on the words of the claim. Remember he said that?  
01:17 23 And then he said the Apple Macintosh uses applications,  
01:17 24 and an application is not a workspace.

01:17 25 But here's the interesting thing, he said,

01:17 1 you've got to look at the words of the claim. That's  
01:17 2 really important. Judge Rader is telling you what that  
01:18 3 means. You've got to look at that. And then he put up  
01:18 4 on a screen Figure 1A and 1B. There wasn't a word on  
01:18 5 the screen. There were words, because the words of the  
01:18 6 claim construction prove they're wrong. If you show the  
01:18 7 words and let you-all look at them and understand the  
01:18 8 issue, it's clear. The patents' invalid.

01:18 9 Let's look at the words. The issue is,  
01:18 10 Mr. Gasey raised one issue with respect to this. No  
01:18 11 question about all the other elements. He raised one  
01:18 12 issue. An application is not a workspace. So let's  
01:18 13 look at the words, on the left, is out of the Court's  
01:18 14 claim construction.

01:18 15 As Judge Rader said, you have to accept  
01:18 16 these. These words are gospel for purposes of  
01:18 17 understanding what this claim means. So the first is  
01:18 18 display object. And Dr. Wilson ran through all this, so  
01:18 19 forgive me for being repetitive, but I want this to be  
01:18 20 clear because there was no other response with respect  
01:18 21 to this system.

01:18 22 A display object is just a display  
01:19 23 feature. It's just something on the screen.  
01:19 24 Dr. Wilson testified to that. That went un rebutted.  
01:19 25 There is no dispute. Dr. Zimmerman never said a single

01:19 1 thing different than that. It is something on the  
01:19 2 screen. So we look, we've got a lot of things on the  
01:19 3 screen, a lot of display objects. So we can check that  
01:19 4 off. We've got display objects.

01:19 5 Now, what is a workspace? A workspace is  
01:19 6 a collection of display objects. This is the Court's  
01:19 7 claim construction. This is not Josh Krevitt's  
01:19 8 explanation, Mr. Gasey's explanation. This is the  
01:19 9 Court's claim construction. You have display objects,  
01:19 10 and you have a collection of them. You've got a  
01:19 11 workspace. You've got to accept that.

01:19 12 Whatever preconceived notions Mr. Gasey  
01:19 13 wants to create or sense that a workspace is different  
01:19 14 than an application is irrelevant. The Court tells you  
01:19 15 what a workspace is. Its' a collection of display  
01:19 16 objects. Use your own eyes. Don't listen to me. Don't  
01:19 17 listen to Mr. Gasey. Use your own eyes.

01:19 18 There are display objects on that screen,  
01:19 19 and there is a collection of display objects on that  
01:20 20 screen. We've circled a bunch of the different display  
01:20 21 objects. When you've got a bunch, you've got a  
01:20 22 collection, and when you've got a collection, you've got  
01:20 23 a workspace, and when you've got a workspace, you've got  
01:20 24 an invalidating piece of prior art. There is no other  
01:20 25 response the Plaintiffs have offered on this piece of

01:20 1 prior art.

01:20 2 Now, that's anticipation. So you never  
01:20 3 will never need to get to the issues of damages, so I'm  
01:20 4 reluctant to even raise it. But since the Plaintiffs  
01:20 5 raised it and Mr. Hill is likely to raise it, I'll raise  
01:20 6 it briefly. I want it to be clear, though, this is a  
01:20 7 waste of all of our time. You'll never -- you never  
01:20 8 need to get to damages.

01:20 9 So what about damages? Speaking  
01:20 10 seriously, our view on damages in this case is use your  
01:20 11 common sense. Use your common sense. Dr. Putnam  
01:20 12 testified he's got a Ph.D. from Yale and a master's from  
01:20 13 Yale, too, maybe. He's got more degrees. And we joke  
01:21 14 around with him that I have never seen a case in which a  
01:21 15 Ph.D. from Yale was less necessary.

01:21 16 Use your common sense. You have patents  
01:21 17 that were given from Xerox to the Plaintiffs. You have  
01:21 18 patents that Xerox licensed. We don't have to guess  
01:21 19 what the marketplace would value these patents. We  
01:21 20 know. It's the same thing I said. How much would you  
01:21 21 pay for a cup of coffee? If you knew somebody else paid  
01:21 22 for a cup of coffee, You want to pay the same thing.  
01:21 23 You want to -- want to pay the same thing to rent a car  
01:21 24 for the same period of time. This is just common sense.  
01:21 25 We all know this.

01:21 1                   Actually, we don't all know this. You may  
01:21 2 recall I asked Mr. Cooper if he and I went and bought a  
01:21 3 cup of coffee at the same time and they charged him  
01:21 4 more. Whether that would be unreasonable, and  
01:21 5 Mr. Cooper said, well, that might be reasonable. And  
01:21 6 then I said, what if they charged you 40 times more?  
01:21 7 Neither one of us had ever been in the store, we order  
01:21 8 the same coffee, same size, little milk, and they charge  
01:22 9 you 40 times more? Would that be reasonable? And  
01:22 10 Mr. Cooper said, yeah, I can see circumstances where  
01:22 11 that would be reasonable.

01:22 12                   It's not reasonable. Anyone who says it  
01:22 13 is has a credibility problem. It's not reasonable.  
01:22 14 That's what the plaintiffs are asking for here. They're  
01:22 15 asking you to focus on IP addresses. And they're asking  
01:22 16 you to mix and match from Fedora and RHEL, and we need  
01:22 17 only look at the licenses. That's what we need to look  
01:22 18 at. What did Xerox license these patents for?

01:22 19                   To HP, \$110,000. There's been a lot of  
01:22 20 confusion about HP because Mr. Gasey said in his  
01:22 21 opening, you may recall, you will see, Mr. Gasey said,  
01:22 22 you will see a license in this case for 99 cents a copy.  
01:22 23 Do you remember that? I do. It surprised me. I wasn't  
01:22 24 aware of that license.

01:22 25                   It doesn't exist. There is no license in

01:22 1 this case for 99 cents a copy. He was talking about the  
01:23 2 HP license. In the HP license, there was a payment of  
01:23 3 \$110,000 that covered, by the way, approximately \$24  
01:23 4 million in sales. 110,000. That's it. That's the HP  
01:23 5 license.

01:23 6 Now, at some point, it's true if they hit  
01:23 7 \$10 million, there was a kicker, and then you started  
01:23 8 paying some money. Never hit the money, never hit the  
01:23 9 10 million, excuse me. HP, you-all may be familiar with  
01:23 10 HP. They are a very large company. Paid \$110,000 for a  
01:23 11 license for 14 years for these patents.

01:23 12 Silicon Graphics, how much did Silicon  
01:23 13 Graphics pay? They had a license for 13 years, totally  
01:23 14 paid up all in, \$95,000, \$95,000. That's what they  
01:23 15 paid. And the Plaintiffs' emphasize, they say all the  
01:23 16 time -- it's one of those issues that's funny because I  
01:23 17 think it cuts against them. They say all the time, the  
01:23 18 Plaintiffs -- excuse me, Silicon Graphics would have  
01:24 19 taken it out. They would have taken that out, and  
01:24 20 that's relevant. Of course, that's relevant. That  
01:24 21 tells you how valuable this is.

01:24 22 It's so not valuable that they would have  
01:24 23 been prepared to take it out. And how much are they  
01:24 24 willing to pay to have this feature? How much are they  
01:24 25 will to pay to keep this feature in their product?

01:24 1 About a hundred grand. That's what we'll pay, not a  
01:24 2 dime more. \$95,000, all in, up front.

01:24 3 Central Point, 14-year license, 14-year  
01:24 4 license also. We have no evidence, nobody has come  
01:24 5 forward with any evidence that a single penny was ever  
01:24 6 paid on that license. Now, it did provide on the  
01:24 7 license for a 25 cent price per unit. It did provide  
01:24 8 for that. There is no evidence. Dr. Putnam told you  
01:24 9 this. Mr. Gemini told you this. No evidence at all  
01:24 10 that even a single dime was ever paid.

01:24 11 So what do you have? You have \$110,000  
01:24 12 paid. You've got zeroish, I don't know what that is,  
01:24 13 paid. And you've got 95,000 paid. That's it from  
01:24 14 Xerox. Three licenses. They had the patents for 13  
01:25 15 years, were out trying to get money for these patents,  
01:25 16 and in 13 years got \$205,000, licensing each one for 14  
01:25 17 years, or in the case of Silicon Graphics -- excuse me  
01:25 18 for 13 years. And then there's one other license  
01:25 19 you-all have heard about, the Apple license.

01:25 20 And there's been -- you've heard some  
01:25 21 discussion about the Apple license and how you should  
01:25 22 understand the Apple license. So let's keep -- let's  
01:25 23 stick to the things we can all agree on. The Apple  
01:25 24 license covered all of Apple's products, every single  
01:25 25 product, from the Macintosh to the iPads to the iTouch

01:25 1 to the iPhone to iTunes to everything. Every one of  
01:25 2 Apple's products was covered by this license.

01:25 3 Another thing, Apple is a very, very big  
01:25 4 company. And with all due respect to my clients, they  
01:25 5 are tiny when it comes to a comparison with Apple.  
01:25 6 Another thing, and Judge Rader instructed you on this,  
01:25 7 the Apple license covered a period of seven years,  
01:26 8 covered a period of seven years. The damages period in  
01:26 9 this case is 14 months. That's one-sixth -- one-sixth  
01:26 10 of the time.

01:26 11 We just -- even if you ignore how big  
01:26 12 Apple is, even if you ignore all of that, you're left  
01:26 13 with give or take \$200,000 just if we were to look only  
01:26 14 at the time.

01:26 15 And so what did we hear today? We heard  
01:26 16 from Mr. Gasey that, well, you should ignore all the  
01:26 17 parts before they sign the license because the older  
01:26 18 version of the Apple didn't have this feature. Two  
01:26 19 problems with that. One, false. The feature that the  
01:26 20 Apple product had was the same as the feature that the  
01:26 21 Plaintiffs accused us of infringement in their letter,  
01:26 22 which they didn't mean when they sued us the next day,  
01:26 23 in their original claim charts that they provided and in  
01:26 24 claim charts submitted in this case reviewed by  
01:26 25 Mr. Cooper and Dr. Zimmerman, same thing.

01:27 1 Number two, in terms of it not being  
01:27 2 covered, there is no evidence. The only thing we have  
01:27 3 is Mr. Cooper telling us that somebody at Apple said  
01:27 4 that maybe this feature was done differently. That's  
01:27 5 not evidence. That's Cooper-talk telling you that this  
01:27 6 feature may have been different. We don't know, that's  
01:27 7 not sufficient evidence. What we do know, what we do  
01:27 8 know as a matter of indisputable fact is that the  
01:27 9 license was for seven years, seven-year license covering  
01:27 10 all of their products.

01:27 11 That's the Apple license.

01:27 12 Now, I want to say one word about usage  
01:27 13 and IP addresses. I don't want to lose you-all. This  
01:27 14 is very important. Do you remember there was a question  
01:27 15 with Judge Rader, and Judge Rader read the word  
01:27 16 approximately or approximate number when it should have  
01:28 17 been appropriate number? The jury instruction said you  
01:28 18 have to find the appropriate number of uses, and Judge  
01:28 19 Rader said, you have to find the approximate number of  
01:28 20 uses. Remember that? And that's a huge difference.  
01:28 21 And here's why.

01:28 22 Approximate number of usage -- uses  
01:28 23 doesn't work. For a damages calculation, you need to  
01:28 24 know with precision, you need to know exactly the number  
01:28 25 of uses. That's why that change in the jury instruction

01:28 1 is so important. That's a big difference, approximate  
01:28 2 doesn't work. And what we know is the following:

01:28 3                         The plaintiffs are relying on IP  
01:28 4 addresses. Do you remember that? IP addresses hit the  
01:28 5 servers. And there were millions of IP addresses. I  
01:28 6 think for Red Hat, there's 60 -- 6.5 million IP  
01:28 7 addresses, remember?

01:28 8                         So what the Plaintiffs do is they take  
01:28 9 that number, and they say, that's the number of units,  
01:28 10 that's the number of units, 6.5 million. Here's what we  
01:28 11 know, though, as a matter of fact. That's not the  
01:29 12 number of units. The best the Plaintiffs will tell you  
01:29 13 is it might be higher than that. It might be lower than  
01:29 14 that. There is no evidence -- more than no evidence.  
01:29 15 All the evidence is to the contrary that in any way IP  
01:29 16 addresses approximates usage let alone demonstrates it.

01:29 17                         Michael Tiemann testified unequivocally:  
01:29 18 Okay. Thank you. So let's take RHEL first. Does Red  
01:29 19 Hat count the number of RHEL users? No. Ever? No.  
01:29 20 Does Red Hat count the number of Fedora users? No.  
01:29 21 Ever? No.

01:29 22                         Markus Rex: So just to be clear, is it  
01:29 23 possible to determine the number of users of OpenSUSE  
01:29 24 products? No, it is not. Is it possible to do that  
01:29 25 using IP addresses? No, it is not.

01:29 1 Remember all the discussion of IP address?  
01:29 2 You cannot look at IP addresses as the number of users.  
01:29 3 They're just is a disconnect there. There is no  
01:29 4 evidence to the contrary. But here's what they do. It  
01:29 5 gets worse. So they start with the number of IP  
01:29 6 address, right, 6.5 million IP addresses, something like  
01:30 7 that. That's worldwide. Everyone knows that. That's  
01:30 8 worldwide. So the first thing, and I won't keep  
01:30 9 reminding you, but I want you to keep in your mind that  
01:30 10 even if you talk about IP addresses as users -- as users  
01:30 11 is wrong. That's wrong. All the evidence in this case  
01:30 12 says that. You can't do that. But let's say we're  
01:30 13 going to just for a moment and we'll follow the  
01:30 14 Plaintiffs' lead on that.

01:30 15 So IP addresses are users just for  
01:30 16 purposes of this discussion. But the Plaintiffs are  
01:30 17 only entitled to the number of uses in the United  
01:30 18 States. That's the law. They can't get uses outside  
01:30 19 the United States. That's just how it works. So  
01:30 20 they've got to figure out a way to go from 6.5 million  
01:30 21 to -- which is worldwide -- to the number in the United  
01:30 22 States, okay? There actually is one thing, and on this  
01:30 23 subject, Michael Tiemann, Markus Rex, were unequivocal  
01:30 24 and in agreement, there's one thing that you know with  
01:30 25 certainty from IP addresses, the country of origin.

01:30 1                   The IP addresses are set by the United  
01:30 2 States Department of Commerce. The IP address to a 99.8  
01:31 3 percent certainty tells you the country of origin. So  
01:31 4 they start with the IP address, which is wrong, and they  
01:31 5 say that's 6.5 million.

01:31 6                   Now, they need to get to the number of  
01:31 7 U.S. We know that number. We actually know that number  
01:31 8 with certainty. We know the number of IP addresses that  
01:31 9 are within the United States. It is 16 percent of the  
01:31 10 total, slightly less than 16 percent. That's what  
01:31 11 Michael Tiemann testified. That we know with certainty,  
01:31 12 99.8 percent certainty. But that's a bad number for the  
01:31 13 Plaintiffs.

01:31 14                  Because if you start at 6.5 million and  
01:31 15 you've got to only take 16 percent of that, that's  
01:31 16 not -- that's not a good number. They're not happy with  
01:31 17 that number. So they've got to ignore -- keep this in  
01:31 18 mind, they start with IP addresses, the only thing we  
01:31 19 know with certainty about IP addresses is the country of  
01:31 20 origin, and they ignore that. They throw the 16 percent  
01:31 21 away. Don't think about that 16 percent.

01:31 22                  But they're stuck still, remember?  
01:32 23 They've got to come up with a number in the United  
01:32 24 States. That they have to do.

01:32 25                  So how do we do that? The way they do

01:32 1 that is by mixing apples and oranges, taking something  
01:32 2 totally irrelevant. They say, okay, IP addresses relate  
01:32 3 to Fedora, but why don't we look at the revenue  
01:32 4 associated with the Red Hat Enterprise Linux products?  
01:32 5 Totally different products, totally different  
01:32 6 distributions. Why don't we look at the revenue?

01:32 7 And it turns out, and you heard Michael  
01:32 8 Tiemann explain why, it turns out that Red Hat gets  
01:32 9 55ish percent of its revenue from the United States,  
01:32 10 different products, nothing to do with IP addresses,  
01:32 11 nothing to do with Fedora. They get 55 percent of their  
01:32 12 revenue for these other products in the United States.

01:32 13 Well, so, what do the Plaintiffs do? They  
01:32 14 say, let's ignore the number we know with certainty, the  
01:32 15 16 percent of IP addresses, that we know absolutely with  
01:32 16 certainty. Let's ignore that. Let's take 55 percent  
01:32 17 instead from the revenue numbers and let's use that  
01:32 18 because that will give us a better number.

01:33 19 Not only is that funny math, not only is  
01:33 20 that no possible way to conceive of a damages award, but  
01:33 21 it captures perfectly what this case is about. This  
01:33 22 case has had no merit from the start. We don't infringe  
01:33 23 these patents. We never have. The patents are invalid,  
01:33 24 those machines invalidate the patents. The patents are  
01:33 25 invalid because of the joint Inventorship issues. The

01:33 1       patents should never have been allowed out of the patent  
01:33 2       office and they shouldn't have been asserted against my  
01:33 3       clients.

01:33 4                   And we -- if there are damages, it's a  
01:33 5       very, very low number. When you think about all the  
01:33 6       other licenses out there, 100,000, 95,000, zero, all the  
01:33 7       other licenses out there, it's a very low number. And  
01:33 8       so you have -- you have red herrings on the  
01:33 9       infringement, you have slight of hand on the invalidity,  
01:33 10      and you have funny voodoo math on the damages, all  
01:34 11      hoping that with confusion and distraction and throwing  
01:34 12      up enough concepts and enough red checks on the board,  
01:34 13      there's just the possibility, a hope, maybe, you-all  
01:34 14      will go back, be confused, throw up your hands, and give  
01:34 15      the Plaintiffs some money.

01:34 16                   That's not how it works. That's not how  
01:34 17      it should work. That's why every day in every way we  
01:34 18      have tried to make this clear for you. We know that  
01:34 19      when you get it, when you understand the issues, when  
01:34 20      you see what our products do, when you see what the  
01:34 21      prior art does, when you understand what the patent  
01:34 22      means, when you get what they're doing with the math, it  
01:34 23      will be very clear that the case has no merit and that  
01:34 24      they should be awarded no damages.

01:34 25                   Thank you very much.

01:34 1 THE COURT: Mr. Hill, how long will you  
01:34 2 be?

01:34 3 MR. HILL: Probably 15 minutes at a  
01:34 4 maximum.

01:34 5 THE COURT: As we've discussed, the party  
01:35 6 with the burden has the last word.

01:35 7 Mr. Hill.

01:35 8 MR. HILL: Thank you, Your Honor.

01:35 9 Ladies and Gentlemen, thank you for your  
01:35 10 attention throughout this trial.

01:35 11 I want to talk to you a little bit about a  
01:35 12 couple things. I want to ask you to do something for  
01:35 13 me. There's a reason, Ladies and Gentlemen, that we've  
01:35 14 been here for a week. And it wasn't so that we could  
01:35 15 try to cram everything in your throat in the last hour.

01:35 16 We do this for a week because we have to  
01:35 17 present evidence to you. And as the Judge told you and  
01:35 18 as in the written instructions you'll take back to the  
01:35 19 jury room, what the lawyers stand up and tell you, isn't  
01:35 20 evidence. What I'm standing here telling you right now  
01:35 21 can't be the basis for your decision.

01:36 22 So I want to ask you to do something for  
01:36 23 me. I want to ask you to just focus in your mind on  
01:36 24 where you were two hours ago. Think about it. What  
01:36 25 were your thoughts of the evidence before you heard a

01:36 1 bunch of argument, before you heard a bunch of things  
01:36 2 that couldn't be the basis for a decision, what were  
01:36 3 your thoughts of the evidence that you had heard over  
01:36 4 the past week.

01:36 5 You heard the Judge read you the legal  
01:36 6 instructions. At the end of those legal discussions --  
01:36 7 or the legal instructions where he gave you the law,  
01:36 8 right there fix your mind. Fix your mind because that's  
01:37 9 the point at which you've got to make a decision. At  
01:37 10 that point in time, you had everything that Judge Rader  
01:37 11 has told you you can and should rely upon to decide the  
01:37 12 questions that he has put in front of you on that  
01:37 13 verdict form, right then.

01:37 14 Now, I will give it to Mr. Krevitt, he is  
01:37 15 a very skilled advocate. He presented to you a very  
01:37 16 robust presentation of what they say the world looks  
01:37 17 like of what they say went on in this courtroom over the  
01:37 18 last five days.

01:38 19 But with all due respect to Mr. Krevitt,  
01:38 20 the way he sees the world ain't why we're here. Why  
01:38 21 we're here is to find out how you folks see the world,  
01:38 22 to find out what was in your mind once you had heard the  
01:38 23 evidence and once you had heard the law from Judge  
01:38 24 Rader.

01:38 25 That's the reason we're here. And I want

01:38 1 to make one point to you about something that  
01:38 2 Mr. Krevitt had to say. He told you that clarity is our  
01:38 3 friend. His friend. That's what he said. He told you  
01:38 4 clarity is his friend. I want you to think back on the  
01:38 5 evidence in this case. I want you to think about  
01:39 6 whether the things he just told you were matched with  
01:39 7 what you remember to be so.

01:39 8 You folks have taken extensive notes  
01:39 9 through this trial. Look back at your notes. Look  
01:39 10 at your notes and remember some of the statements that  
01:39 11 Mr. Krevitt just gave you. See if they jive with your  
01:39 12 recollection of these witnesses, with your recollection  
01:39 13 of the evidence you had presented to you.

01:39 14 I want to show you one thing. I want to  
01:39 15 look at the document camera to do it. Mr. Krevitt made  
01:39 16 a big point about a comment that Judge Rader reread out  
01:39 17 of the jury instructions on the issue of damages. He  
01:39 18 said to you that damages have to be determined -- this  
01:39 19 was his word -- with precision. Precision. That  
01:39 20 conveys a definite meaning. Precision. Let's look at  
01:40 21 the jury instruction. Let's look right there at the  
01:40 22 bottom of the last page of what the Judge just told you  
01:40 23 was the law.

01:40 24 Plaintiffs satisfy their burden by showing  
01:40 25 the extent of damages as a matter of just reasonable

01:40 1 inference, even if the damages are established by an  
01:40 2 approximation. Does that say even if the damages are  
01:40 3 established with precision or they must be established  
01:40 4 with precision? No, it doesn't.

01:40 5 I don't show you that because I don't  
01:40 6 believe that we've proven damages in this case. I  
01:40 7 believe we have. You folks saw the evidence. I believe  
01:40 8 we've proven every element of each cause of action.

01:40 9 You folks got to hear Dr. Zimmerman on day  
01:40 10 one, I believe it was, testify about infringement in  
01:40 11 this case and walk you through the claim language and  
01:40 12 show you screen shots from the accused products so that  
01:40 13 you could decide in your mind whether we had met each of  
01:41 14 those claim limitations, whether these accused products  
01:41 15 practice, tread on our property.

01:41 16 But Mr. Krevitt, to hear him talk, that  
01:41 17 didn't happen. The reason I show you that, folks, is  
01:41 18 that this is like all lawsuits, it comes down to  
01:41 19 deciding who you believe. It comes down to credibility.  
01:41 20 Credibility.

01:41 21 If you look at the evidence that's  
01:41 22 presented to you and then you see that evidence get  
01:41 23 tested on cross-examination, and you have to decide,  
01:41 24 we've got two people saying different things, and each  
01:41 25 person's story is being tested. It's being tested in

01:41 1 what we, in this American system of justice, call the  
01:42 2 crucible of trial. That's what we do here.

01:42 3 We lay the evidence out before you so that  
01:42 4 you folks can decide what is the truth, not who's got  
01:42 5 the best lawyer, not who can put the best spin on it,  
01:42 6 but who can tell you and is telling you the truth.

01:42 7 You've had a chance for a week to look at  
01:42 8 the claim language out of these patents. You've had a  
01:42 9 chance for a week to see pictures of their products and  
01:42 10 how they operate. You've had a chance for a week to see  
01:42 11 the source code from those products to show that they  
01:42 12 function as described in these patents. And you've had  
01:42 13 a week to hear people tell you, didn't do it, can't do  
01:42 14 it, but if we do do it, somebody did it before us. And  
01:42 15 if we do do it, maybe they were too generous in giving  
01:43 16 credit for the invention. And if we do do it and the  
01:43 17 patents are valid, well, we really can't figure out how  
01:43 18 many of these things we sell. And if we do do it and  
01:43 19 the patents are valid and we can't figure out how many  
01:43 20 of these things they sell, the attempts they make to  
01:43 21 figure out how many we sold, those aren't any good.

01:43 22 Where does it stop? Where does the  
01:43 23 cafeteria line stop? They want to lay it out there for  
01:43 24 you and ask you to pick off their cafeteria-line  
01:43 25 defense.

01:43 1                   But all you folks have to do is focus on  
01:43 2 the evidence. And if you focus on the evidence and you  
01:43 3 focus on what you see in this courtroom, a Plaintiff who  
01:43 4 decided they wanted to stand up for their property  
01:43 5 rights, knowing when they stood up for the property  
01:44 6 rights that they were going against the behemoths of the  
01:44 7 industry, knowing that they were going against people  
01:44 8 who openly say they hate software patents, knowing that  
01:44 9 they were going to have to sue those folks, and they  
01:44 10 were going to be put through three years of hell just to  
01:44 11 get here to try to get a fair shake to try to hope that  
01:44 12 a jury would look at the situation and judge it on the  
01:44 13 facts, judge it by what they believe is the truth, not  
01:44 14 by what the best experts you can buy, that you can  
01:44 15 purchase, and the best lawyers you can hire. Not  
01:44 16 depending on how they can spin it.

01:44 17                   My clients took that on. And they knew it  
01:44 18 would be -- they'd have to weather the storm to get  
01:44 19 here, and they have. They've weathered the storm. And they  
01:45 20 now they want you folks to find the truth. And they  
01:45 21 want you folks to look at their invention, look at the  
01:45 22 products that they believe practice their invention and  
01:45 23 award them what is fair and just compensation for  
01:45 24 somebody trading on other people's property.

01:45 25                   Thank you for your time. I appreciate

01:45 1 your hard work this week. I appreciate the hard work  
01:45 2 you're fixing to have to go do. And I thank you for  
01:45 3 your verdict. Thank you, Your Honor.

01:45 4 THE COURT: Ladies and gentlemen, we've  
01:45 5 reached the point where you will deliberate, you will  
01:45 6 deliberate according to the instructions I've given you,  
01:45 7 you will follow the law I've given you. You will bring  
01:45 8 us a verdict. If you need to communicate, follow the  
01:45 9 instructions I've given you on that.

01:45 10 Thank you very much for your service.  
01:45 11 We'll hear from you again when you have a verdict.  
01:46 12 Thank you.

01:46 13 All rise for the jury.  
01:46 14 (Jury out.)

01:46 15 THE COURT: Gentlemen, I'll have access to  
01:46 16 you if I need you? That means I need somebody here at  
01:46 17 the -- I need somebody here at the courthouse at all  
01:47 18 times so that, if necessary, I get a question or  
01:47 19 something, I can have access to all of you within  
01:47 20 minutes, please. Thank you very much.

01:47 21 MR. LYON: One minute, Your Honor, just  
01:47 22 these disks need to be taken into the jury room, I  
01:47 23 understand.

01:47 24 THE COURT: That is correct.

01:47 25 Will you take care of that, Mr. Stewart

01:47 1 and Ms. Dickman.

01:47 2 (Recess.)

01:47 3 (Jury out.)

4 THE COURT: We've received a communication  
02:58 5 from the jurors, and I'll read it. It says simply:

02:58 6 Copy of Judge's instructions.

02:58 7 MR. GASEY: I think there was an agreement  
02:59 8 between the parties last night that we weren't going to  
02:59 9 supply the instructions, and in the absence of getting  
02:59 10 Defendants' lawyers crossways with their partners, I  
02:59 11 think we should probably stick with that agreement for  
02:59 12 the moment, Your Honor.

02:59 13 MS. LAVALLE: That's correct. We did  
02:59 14 agree.

02:59 15 THE COURT: Then I will draft a response,  
02:59 16 which I'll read to both of you.

02:59 17 MR. GASEY: All right.

02:59 18 MR. GIBBONS: Just so it's clear, the  
02:59 19 instructions Your Honor read to the jury, right?

03:00 20 DEPUTY CLERK: Right.

03:00 21 (Pause in the proceedings.)

03:00 22 THE COURT: Ms. LaValle, Mr. Hill,  
03:00 23 Mr. Gasey: Because you've both heard and read along  
03:00 24 with the Court's legal instructions, you've received all  
03:00 25 you need to receive to proceed for a verdict, Judge

03:00 1 Rader.

03:00 2 Will that be fine?

03:00 3 MR. GASEY: It's agreeable with us, Your  
03:00 4 Honor.

03:00 5 MS. LAVALLE: Yes.

03:01 6 THE COURT: Thanks. If you'd stay  
03:01 7 available. We never know what they may want to hear  
03:01 8 from us.

03:01 9 (Further jury deliberations.)

03:54 10 (Jury out.)

03:54 11 THE COURT: I understand we have a  
04:00 12 verdict. We're all professionals and we've probably  
04:00 13 done this plenty of times, but it's never inappropriate  
04:00 14 to remind ourselves that we don't react whatsoever to  
04:00 15 whatever they say. There are times for reaction outside  
04:00 16 of the courtroom later.

04:00 17 I'm going to call them in; we'll hear that  
04:00 18 verdict.

04:00 19 Do you wish to have the jury polled?

04:00 20 MR. HILL: No, Your Honor, not from the  
04:00 21 Plaintiffs.

04:00 22 THE COURT: Mr. Krevitt, do you wish to  
04:00 23 have the jury polled?

04:00 24 MR. KREVITT: No, Your Honor.

04:00 25 THE COURT: Then we'll take their verdict,

04:00 1 and then I'm going to go back and talk to them for a few  
04:01 2 minutes. I'll tell them a couple of things. I'll tell  
04:01 3 them that under Eastern District rules, you're not to  
04:01 4 contact them, but they could contact you and that you'd  
04:01 5 probably all like to talk to them, if they do.

04:01 6 And I'll also listen to them a little bit.  
04:01 7 It's always important for them to feel like they've had  
04:01 8 a chance to air their views a little bit to me. So I'll  
04:01 9 do that.

04:01 10 Then I'll return here, and I would like to  
04:01 11 have just a minute to tie up loose ends, see what we may  
04:01 12 need to do from here or not do from here.

04:01 13 All ready?

04:01 14 MR. GASEY: Yes, Your Honor.

04:03 15 (Jury in.)

04:03 16 THE COURT: Please be seated.

04:03 17 May I inquire who is the Foreperson?

04:03 18 Ms. Bates?

04:03 19 FOREPERSON: Yes.

04:03 20 THE COURT: Would you get from Ms. Bates  
04:03 21 the verdict form. I'll return that to you in just one  
04:03 22 moment. I'm just checking to make sure it's completed  
04:04 23 at this point.

04:04 24 FOREPERSON: Yes, sir.

04:04 25 (Pause in the proceedings.)

04:04 1 THE COURT: It does appear complete.  
04:04 2 Would you take that back to Ms. Bates.  
04:04 3 Ms. Bates, would you stay standing, and  
04:04 4 I'm going to ask you -- there are 23 questions there.  
04:04 5 I'm going to ask you just in numerical order. I think  
04:04 6 we all know what the questions are. I'll ask you  
04:04 7 Question No. 1, 2, 3, 4 --  
04:04 8 FOREPERSON: Okay.  
04:04 9 THE COURT: -- all through the 23, and  
04:04 10 you'll just give me the unanimous verdict of your jury.  
04:05 11 Question 1 is a yes or no on infringement.  
04:05 12 FOREPERSON: No.  
04:05 13 THE COURT: Question 2?  
04:05 14 FOREPERSON: No.  
04:05 15 THE COURT: Question 3?  
04:05 16 FOREPERSON: No.  
04:05 17 THE COURT: Question 4?  
04:05 18 FOREPERSON: No.  
04:05 19 THE COURT: Question 5?  
04:05 20 FOREPERSON: No.  
04:05 21 THE COURT: Question 6?  
04:05 22 FOREPERSON: No.  
04:05 23 THE COURT: Question 7?  
04:05 24 FOREPERSON: No.  
04:05 25 THE COURT: Question 8?

04:05 1 FOREPERSON: No.  
04:05 2 THE COURT: Question 9?  
04:05 3 FOREPERSON: No.  
04:05 4 THE COURT: Question 10?  
04:05 5 FOREPERSON: No.  
04:05 6 THE COURT: Question 11?  
04:05 7 FOREPERSON: No.  
04:05 8 THE COURT: Question 12?  
04:05 9 FOREPERSON: No.  
04:05 10 THE COURT: Question 13?  
04:05 11 FOREPERSON: No.  
04:05 12 THE COURT: Question 14?  
04:05 13 FOREPERSON: No.  
04:05 14 THE COURT: Question 15?  
04:05 15 FOREPERSON: No.  
04:05 16 THE COURT: Question 16?  
04:05 17 FOREPERSON: No.  
04:05 18 THE COURT: Question 17?  
04:05 19 FOREPERSON: Yes.  
04:05 20 THE COURT: Question 18?  
04:05 21 FOREPERSON: Yes.  
04:05 22 THE COURT: Question 19?  
04:06 23 FOREPERSON: Yes.  
04:06 24 THE COURT: Question 20?  
04:06 25 FOREPERSON: Yes.

04:06 1 THE COURT: Question 21?

04:06 2 FOREPERSON: Yes.

04:06 3 THE COURT: Question 22?

04:06 4 FOREPERSON: Zero.

04:06 5 THE COURT: Question 23?

04:06 6 FOREPERSON: Zero.

04:06 7 THE COURT: Thank you. Now if you will  
04:06 8 return that to the verdict form.

04:06 9 Yes, we'll give that to Jan.

04:06 10 Everything clear, Mr. Krevitt, Mr. Gasey?

04:06 11 MR. GASEY: Yes, Your Honor.

04:06 12 MR. KREVITT: Yes, Your Honor.

04:06 13 THE COURT: Fine. What I'd like to do at  
04:06 14 this point is first, in the presence of everyone who's  
04:06 15 participated here, I'd like to express our great thanks  
04:06 16 to you for your time and your efforts. And I'm going to  
04:06 17 express even more than that in just a few moments.

04:07 18 I'd like to return with you to the jury  
04:07 19 room and just for a few minutes be available to you to  
04:07 20 ask me, if I won my last tennis match, or anything else.  
04:07 21 I wish to just be available to you for a few minutes.

04:07 22 I have a few things I'd like to say to you  
04:07 23 to kind of wrap things up. And I'll do that, and then  
04:07 24 I'll return here for just a few minutes with all of you,  
04:07 25 if I may.

04:07 1 So, once again, formally, in front of all  
04:07 2 of those who participated, we thank you. And you're  
04:07 3 dismissed from your responsibilities, and I'll join you  
04:07 4 for a moment.

04:07 5 (Jury out.)

04:08 6 (Recess.)

04:08 7 THE COURT: I'm sorry to hold you here for  
04:24 8 a little longer. Could we talk just a little?

04:24 9 One thing I wanted to say that probably is  
04:24 10 well understood, but I want to say it anyway, and that  
04:24 11 is when this case is appealed, and I expect it will be,  
04:24 12 I can absolutely guarantee you that Circuit Judge Rader  
04:24 13 will have absolutely no knowledge about when the case is  
04:24 14 filed.

04:24 15 Even though at that time, he'll be the  
04:24 16 Chief Judge, he will ensure that he does not even know  
04:24 17 when it's to be heard. The Cornell case that I handled  
04:24 18 last year was heard last month. I didn't know that  
04:24 19 until one of my colleagues mentioned in the elevator.

04:25 20 They were swiftly upbraided that they  
04:25 21 should not have mentioned it in the elevator, but I'm  
04:25 22 just mentioning that so you know that I will not have  
04:25 23 anything to do with that.

04:25 24 And if we have altogether made some  
04:25 25 mistake, we'll come back and we'll do this again, and

04:25 1 I'll come back and do it.

04:25 2 Now, what remains for us to do, I need  
04:25 3 advice from any of you on things that we might need to  
04:25 4 follow up with.

04:25 5 MR. HILL: Your Honor, at this point --

04:25 6 MR. REITER: Do you guys want to -- we  
04:25 7 have the Rule 50 after judgment, which obviously this is  
04:25 8 a judgment.

04:25 9 But do you guys want to pick a day, like a  
04:25 10 week --

04:25 11 MR. GASEY: That's fine. If we could have  
04:26 12 a week to go ahead and to file and get perfected our  
04:26 13 Rule 50 motions.

04:26 14 THE COURT: That would be just fine. Is a  
04:26 15 week enough?

04:26 16 MR. REITER: How about two weeks?

04:26 17 MR. GASEY: Two is fine with us.

04:26 18 THE COURT: We've all been rushing to get  
04:26 19 to this point, and we don't have to rush anymore. So  
04:26 20 two weeks will be fine with me.

04:26 21 Mr. Gasey and Mr. Reiter, Mr. Krevitt, two  
04:26 22 weeks then.

04:26 23 Anything beyond that?

04:26 24 MR. GASEY: Not from the Plaintiffs.

04:26 25 THE COURT: I assume that --

04:26 1 COURT ROOM DEPUTY: The trial exhibits.

04:26 2 THE COURT: Yes, what do we do with the  
04:26 3 trial exhibits?

04:26 4 MR. REITER: Until judgment is entered, I  
04:26 5 think they have to stay with the Court.

04:26 6 THE COURT: Well, I will enter judgment  
04:26 7 forthwith, if there's no reason for me to slow down.

04:27 8 MR. GASEY: No, Your Honor.

04:27 9 THE COURT: Then that will happen as soon  
04:27 10 as I can find the right form and sign it. And if  
04:27 11 there's nothing further, then I will release you.

04:27 12 And let me say that regardless of  
04:27 13 outcomes, it's kind of sad that there's an outcome in  
04:27 14 these sorts of events, but there is. I've been  
04:27 15 absolutely delighted with the character and performance  
04:27 16 of counsel.

04:27 17 I came down here to the Eastern District  
04:27 18 for a couple reasons, and I can say I was impressed  
04:27 19 enormously with the jury pool. I've told you that.  
04:28 20 I've never had a jury pool where people didn't try to  
04:28 21 evade responsibility more than accept it, and you don't  
04:28 22 see that here. And I thought counsel can be enormously  
04:28 23 proud of themselves on both sides.

04:28 24 Thank you, Gentlemen.

04:28 25 There's an order been filed you're to

04:28 1 follow that you get to take away the exhibits, but  
04:28 2 you've agreed to file copies on a DVD that I will  
04:28 3 receive, that the Court will receive.

04:28 4 You understand all that?

04:28 5 MR. GASEY: Yes.

04:28 6 MR. REITER: That's fine, Your Honor.

04:29 7 THE COURT: It's on the record.

04:29 8 COURT ROOM DEPUTY: The original patents  
04:29 9 are in the jury room. Do you want to take those?

04:29 10 MR. GASEY: Yes.

11 (Court adjourned.)  
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## CERTIFICATION

I HEREBY CERTIFY that the foregoing is a  
true and correct transcript from the stenographic notes  
of the proceedings in the above-entitled matter to the  
best of my ability.

11 DONNA COLLINS, CSR  
12 Deputy Official Court Reporter  
State of Texas No. 1086  
Expiration Date: 12/31/10

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Date

16 GLENDA FULLER, CSR  
Deputy Official Court Reporter  
State of Texas No. 1042  
17 Expiration Date: 12/31/10

Date